

**IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION**

McCLELLAN CJ at CL

FRIDAY 15 OCTOBER 2010

**297559/09 DYE v COMMONWEALTH BANK OF
AUSTRALIA**

JUDGMENT

- 1 **HIS HONOUR:** The plaintiff brings an application that proceedings 297559/09 in this Court be transferred to the Federal Court.

- 2 That order is sought pursuant to s 5 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987. Section 5 provides:
 - “(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 - (i) (Repealed)
 - (ii) having regard to:
 - (A) whether, in the opinion of the Supreme Court, apart from any law of the Commonwealth or another State relating to cross-vesting of jurisdiction and apart from any 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 any 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,

(iii) (Repealed)

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

- (2) 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 any 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

the State or Territory referred to in sub-subparagraph (A) and not within the jurisdiction of the first court apart from this Act and any 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.

(3) Where:

(a) a proceeding (in this subsection referred to as the **relevant proceeding**) is pending in the Supreme Court of another State or of a Territory (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 New South Wales and it is more appropriate that the relevant proceeding be determined by the Supreme Court of New South Wales,

(ii) having regard to:

(A) whether, in the opinion of the first court, apart from this Act and any 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 New South Wales,

(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 the State and not within the jurisdiction of the first court apart from this Act and any 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 Supreme Court of New South Wales, or

(iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of New South Wales,
the first court shall transfer the relevant proceeding to the Supreme Court of New South Wales.

(4) Where:

(a) a proceeding (in this subsection referred to as the **relevant proceeding**) is pending in the Federal Court or the Family 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 and it is more appropriate that the relevant proceeding be determined by the Supreme Court,

(ii) having regard to:

(A) whether, in the opinion of the first court, the relevant proceeding or a substantial part of it would have been incapable of being instituted in that court, apart from any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, and

(B) whether, in the opinion of the first court, the relevant proceeding or a substantial part of it would have been capable of being instituted in the Supreme Court, apart from any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, and

(C) 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 the State and not within the jurisdiction of the first court apart from any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, and

(D) the interests of justice,

it is more appropriate that the relevant proceeding be determined by the Supreme Court, or

(iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court,
the first court shall transfer the relevant proceeding to the Supreme Court.

(5) (Repealed)

(6) Where:

(a) a court (in this subsection referred to as the **first court**) transfers a proceeding to another court under a law or laws relating to cross-vesting of jurisdiction, and

(b) it appears to the first court that:

(i) there is another proceeding pending in the first court that arises out of, or is related to, the first-mentioned proceeding, and

(ii) it is in the interests of justice that the other proceeding be determined by the other court,

the first court shall transfer the other proceeding to the other court.

(7) A court may transfer a proceeding under this section on the application of a party to the proceeding, of its own motion or on the application of the Attorney-General of the Commonwealth or of a State or Territory.

(8) A person who is entitled to practise as an Australian legal practitioner in a court has, if a proceeding (in this subsection referred to as the **transferred proceeding**) in that court is transferred to another court under a law or laws relating to cross-vesting of jurisdiction, the same entitlement to practise in relation to:

(a) the transferred proceedings, and

(b) any other proceeding out of which the transferred proceeding arises or to which the transferred proceeding is related, being another proceeding that is to be determined together with the transferred proceeding,

in the other court that the person would have if the other court were a federal court exercising federal jurisdiction.

(9) Nothing in this section confers on a court jurisdiction

that the court would not otherwise have.”

- 3 Section 5(1)(b)(ii) provides the criteria which, if made out, oblige this court to transfer the proceedings to the Federal Court.
- 4 The language of the section makes plain that there is no discretion and the court "shall transfer the relevant proceedings" in the event that the matters referred to in the subsection are made out.
- 5 Section 5(1)(b)(ii) provides that if "it is more appropriate that the relevant proceeding be determined" by the Federal Court, having regard to matters provided in 5(1)(a)-(b) then they should be transferred.
- 6 It seems to me that subsections (b)(ii)(A)-(B) are not of significance to these proceedings, leaving (C) "the interests of justice."
- 7 I should indicate that the matter has been argued before me today at some length, and given the proximity of the hearing date in this court and the preparations which are being made for that hearing, it is of the utmost importance that a decision be given with expedition. It is for that reason I determined to deliver these reasons after conclusion of the argument.
- 8 The history of the matter is provided in affidavit material and in a chronology which has been placed before me. In short, the plaintiff was an employee of CommSec which is a wholly owned subsidiary of the Commonwealth Bank.
- 9 She left CommSec's employment in November 2007 alleging that she had been constructively dismissed. The circumstances in which she left CommSec, I infer, are related to the factual matters in these proceedings.
- 10 At that time, or at about that time, she alleged that some employees of CommSec had sexually harassed and victimised her. She initially raised the matters with superior officers of CommSec and after she resigned,

she lodged an application under the *Australian Human Rights Commission Act 1986* (Cth). Those proceedings were commenced in December 2007 and then in June 2008, the Commissioner terminated the proceedings, and in July 2008 the plaintiff commenced proceedings in the Federal Court claiming damages.

- 11 On 16 April 2008, an article was published in the Daily Telegraph in substance detailing the plaintiff's complaints. Ms Chapman, who held the position of Group Executive in the Commonwealth Bank prepared and distributed an email responding to the article in the newspaper. In substance, the e-mail rejected the allegations which the plaintiff had made. That e-mail subsequently became the matter complained of in defamation proceedings commenced in this court. Those proceedings were commenced on 15 April 2009.
- 12 The defamation proceedings, and the proceedings in the Federal Court, have proceeded and from the material before me, it is plain that very considerable effort has been expended by solicitors, and I assume counsel, in the preparation of those matters for hearing.
- 13 In the course of that preparation, there appear to have been a number of disputes. One of those disputes relates to the comprehensiveness of discovery sought by the plaintiff. She alleges that the discovery was inadequate, and as a consequence it was not until February 2010 that she became aware of the extent of the distribution of emails, both within the Commonwealth Bank and to other financial institutions, which she alleges defamed her.
- 14 The defendant says that the plaintiff was aware of the nature of that communication, at an earlier time, although accepting that the full extent of the distribution may not have been apparent to her.
- 15 In April 2010, the present proceedings came before me upon the plaintiff's application for a stay. The foundation for that stay was said to

be a difficulty in preparing the matter for hearing, given that the Federal Court proceedings were then listed to commence in September 2010.

- 16 I declined to stay the proceedings, but decided that it was appropriate to provide for them to be heard after the Federal Court proceedings and accordingly fixed them to for hearing on 15 November 2010. That fixture remains in place and I am assured by both the plaintiff and the defendant that the matter is ready for hearing on that day. In the mean time, the plaintiff had moved, on 15 February 2010, in the Federal Court to amend her pleadings to plead injurious falsehood. Why that course was taken in the Federal Court rather than seeking to amend the pleadings in this court is not apparent.
- 17 The proceedings to amend to plead injurious falsehoods were heard in the Federal Court, but not resolved until September after there had been an appeal to the Full Court. After that judgment, the plaintiff moved the court to have the trial date in the Federal Court vacated. That order was granted, and the matter has been fixed to commence before Buchanan J on 7 March 2010. His Honour has made plain in the transcript of proceedings before him that he will only be able to sit four days in each week for the hearing of the case and will not be able, by reason of full court commitments, to sit beyond the end of April. He also notes that some other days may be lost during that period because of his other commitments.
- 18 The current estimate for the proceedings in the Federal Court is eight weeks. The parties believe that the time allocated in the Federal Court is sufficient to dispose of the issues presently pleaded in that matter.
- 19 I have been informed that Justice Buchanan said there will be no more interlocutory hearings. However, the level of disputation between these parties in relation to pleadings, discovery and interrogatories does not fill me with any confidence that pre-trial disputations will be avoided.

Indeed, I think it quite likely that those disputes will continue.

- 20 Whether they would have the consequence of causing the hearing date to be abandoned, I could not say. I note, however, that the plaintiff has given an undertaking to this court that she will not make an application to have the hearing date now fixed in the Federal Court vacated. That undertaking is of significance, but would have to be understood in light of the complexities of the case, with the possibility that unforeseen matters may, in the interests of justice, require those proceedings to be adjourned further.
- 21 As I previously indicated, the proceedings in this court are now ready for hearing. The plaintiff of course chose to commence both the proceedings in the Federal Court and the defamation proceedings in this Court.
- 22 Of considerable significance is the fact that, given the nature of the claims and their disparate legal foundations, the Commonwealth Bank and Ms Chapman elected to retain a firm of solicitors. That firm is a different firm to the firm which has been retained by CommSec for the Federal Court proceedings. The consequence is that, on any view, very significant work will have been done by each of the solicitors, which could have been avoided if a single set of proceedings had been commenced, or at least brought together at an earlier point in time.
- 23 I am informed that the solicitor client costs to date of the proceedings in this court are in excess of \$1 million. Having regard to the extent of my knowledge of the case, it does not surprise me that a very considerable sum has been expended. Quite how much would be recovered on a party party basis, and how much has actually been lost, I cannot presently gauge. However, if I was to transfer these proceedings to the Federal Court, it would be likely that a very significant proportion of the work done by the solicitors for the defendants in the current proceedings would be wasted.

- 24 The plaintiff submitted that I should make the order for transfer, and has indicated that it would seek to have the defamation proceedings heard together with the Federal Court proceedings. Such an order would not be opposed by the defendant. The advantage, if that was to happen, would be that the factual matrix underpinning the plaintiff's allegations would be determined in one set of proceedings, and the factual findings, and in particular credit issues, resolved by the one judge.
- 25 If I do not make the order, the defamation proceedings will take place. It is conceivable that the factual findings made in those proceedings may assist the parties to resolve the Federal Court proceedings without the necessity for further litigation. However, there could be no certainty that the resolution of the proceedings in this court would have the consequence that the Federal Court proceedings would not proceed, and although one could expect that there may be some savings of costs if the proceedings in this court are heard and resolved, that is only an expectation. There could be no certainty about the matter.
- 26 The plaintiff submitted that there were jurisdictional reasons why it was necessary for the defamation proceedings to be heard in the Federal Court. I am not persuaded that there is any substance in those submissions. It is plain that this court, as it does every week, has jurisdiction to hear defamation proceedings, both in relation to publications within the State, and also publications which are made outside of the State.
- 27 I have found the matter difficult to resolve. There are reasons why, given the proximity of the hearing date and the fact that the matter is ready for hearing, the defamation proceedings should continue. The plaintiff chose to commence those proceedings in this court; the defendant has prepared itself to defend them, and has expended considerable monies related only to the defence of those proceedings.
- 28 If I make an order transferring the matter to the Federal Court, justice

demands that the plaintiff pay the costs which will prove to have been unnecessarily incurred. If I do not order the transfer, the consequence may be that the same factual material will have to be examined in two courts, with the potential for considerable wastage of costs. It is impossible for me to gauge what the extent of that wastage might be, but from the ferocity of the current litigious activity, and the little I have been told about the time taken in various skirmishes to date, those costs could be considerable. There would also be the risk, which a court should in the interests of justice seek to avoid, of contradictory factual findings, particularly in relation to matters of credit.

- 29 I am mindful of the difficulties which the parties have had in preparing these matters for hearing to date. However, we are now early in October, the hearing date having been fixed for March next year. That timeframe should, even with the difficulties these parties have so far experienced, be sufficient to resolve the pre-trial matters which may require further resolution.
- 30 As I understand the position, discovery is complete and interrogatories are effectively completed. There may be some issues arising from the pleadings and perhaps particulars, but I do not see those as insurmountable within that timeframe.
- 31 The defendant submits that the addition of these proceedings to the Federal Court proceedings has the capacity to extend them well beyond the time which has been allotted for the proceedings in that court.
- 32 I am not presently persuaded that that submission is as significant as the defendant no doubt believes it to be. I accept there will be some additional time taken, but that will be in understanding the law of defamation in its application to the facts of the case. Although that will take a little time, defamation law being, as I have remarked in other cases, a matter of considerable complexity, the fundamental requirement for time at the hearing will be for the resolution of the factual matters

which will be in large part common to both cases. If the time is extended, I do not believe it would be significant.

33 I would also expect, although I base this only upon the conduct of matters in this Court, that given the complexity of this case, and its significance to the parties, and the time taken in bringing it on for hearing, that if the court has to make particular arrangements to ensure that the matter is concluded without significant interruptions, those arrangements would be made.

34 I therefore make my decision, confident that the Federal Court, as would this Court, make arrangements for the matter to be heard to conclusion once it commences. Bearing all of those considerations in mind, I have come to the conclusion that it is in the interests of justice that the matter in this Court be transferred to the Federal Court, and I will make that order in due course. However, it will be made with an order that the plaintiff be ordered to pay the costs of the defendant which have been wasted by reason of the commencement of the defamation proceedings in this Court, and the lateness of the application for their transfer to the Federal Court.
