Federal Court of Australia

DJ Builders & Son Pty Ltd (in liq), in the matter of DJ Builders & Son Pty Ltd (in liq) v Queensland Building and Construction Commission (No 3) [2021] FCA 1041

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| File number: | QUD 361 of 2019 |
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| Judgment of: | **DERRINGTON J** |
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| Date of judgment: | 31 August 2021 |
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| Catchwords: | **HIGH COURT AND FEDERAL COURT** – jurisdiction – whether negligence action within scope of Federal Court’s jurisdiction – whether part of matter arising from federal law because applicant company is in liquidation – whether federal jurisdiction is attracted because separate “matter” is included in same proceedings – no jurisdiction with respect to negligence action – matter transferred to Supreme Court of Queensland |
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| Legislation: | *Corporations Act 2001* (Cth) ss 124, 477  *Federal Court of Australia Act 1976* (Cth) ss 19, 31A  *Judiciary Act 1903* (Cth) s 39B  *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) s 5  *Federal Court Rules 2011* (Cth) rr 9.02, 13.01 |
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| Cases cited: | *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559  *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212  *CGU Insurance Limited v Blakeley* (2016) 259 CLR 339  *Chahwan v Euphoric Pty Ltd* (2008) 245 ALR 780  *Crouch v Commissioner for Railways* (1985) 159 CLR 22  *DJ Builders & Son Pty Ltd (in liq), in the matter of DJ Builders & Son Pty Ltd (in liq) v Queensland Building and Construction Commission* [2019] FCA 2018  *Fencott v Muller* (1983) 152 CLR 570  *Hafertepen v Network Ten Pty Limited* [2020] FCA 1456  *Lauro v Minter Ellison Lawyers (No 2)* [2018] SASC 70  *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575  *McCarthy v Federal Commissioner of Taxation* (2013) 249 FCR 140  *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583  *Palmer v Ayres* (2017) 259 CLR 478  *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141  *Rana v Google Inc* (2017) 254 FCR 1  *Re Judiciary and Navigation Acts* (1921) 29 CLR 257  *Re Wakim; Ex parte McNally* (1999) 198 CLR 511  *Rizeq v Western Australia* (2017) 262 CLR 1  *RNB Equities Pty Ltd v Credit Suisse Investment Services (Australia) Ltd* (2019) 370 ALR 88  *Scott Russell Constructions Pty Ltd (In Liq) v QBCC* [2019] FCA 1378 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Number of paragraphs: | 49 |
|  |  |
| Date of hearing: | 9 July 2021 |
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| Solicitor for the Applicants: | Mr S Ivantsoff of EQ Legal |
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| Counsel for the Respondent: | Mr S Forrest |
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| Solicitor for the Respondent: | QBCC |

ORDERS

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|  | | QUD 361 of 2019 |
| IN THE MATTER OF DJ BUILDERS & SON PTY LIMITED ACN 119 020 049 (IN LIQUIDATION) | | |
| BETWEEN: | DJ BUILDERS & SON PTY LIMITED ACN 119 020 049 (IN LIQUIDATION)  First Applicant  FORWARD PACK PTY LIMITED ACN 120 534 090  Second Applicant | |
| AND: | QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION  Respondent | |

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| order made by: | DERRINGTON J |
| DATE OF ORDER: | 31 August 2021 |

THE COURT ORDERS THAT:

1. The respondent’s interlocutory application filed 30 April 2021 is allowed.
2. It is declared that the first applicant’s claim for damages for negligence in the applicants’ Originating Application filed 4 June 2019, as articulated in their Amended Statement of Claim filed 18 March 2021, is not within the jurisdiction of the Federal Court of Australia pursuant to s 39B of the *Judiciary Act 1903* (Cth) or otherwise.
3. Pursuant to s 5(4) of the *Jurisdiction of Courts (Cross-vesting) Act* *1987* (Cth), the proceeding numbered QUD 361 of 2019 and titled “*DJ Builders & Son Pty Limited (in liquidation) and Anor v Queensland Building and Construction Commission*” be transferred to the Supreme Court of Queensland.
4. The applicants pay the respondent’s costs of the interlocutory application filed 30 April 2021.
5. The parties have liberty to apply to the Registrar for orders with respect to the payment out of the Litigants’ Fund of moneys paid into the Fund in accordance with the orders of Reeves J made in this matter on 7 February 2020.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J:

## Introduction

1. In this matter, the first applicant, DJ Builders & Son Pty Ltd (in liquidation) (DJ Builders), claims damages for negligence from the respondent, the Queensland Building and Construction Commission (QBCC), in respect of the latter’s exercise of powers under the *Queensland Building and Construction Commission Act 1991* (Qld) (*QBCC Act*). On 4 June 2019, the second applicant, Forward Pack Pty Ltd (Forward Pack), which owns 50% of the shares in DJ Builders, commenced this action purportedly on behalf of DJ Builders. As at that time, no order had been made permitting it to do so and it appears that it had no authority from the company to do so. However, it included in the proceedings a claim for purported interlocutory relief seeking orders, pursuant to the Court’s inherent jurisdiction, permitting it to bring and take responsibility for DJ Builders’ action. Subsequently, on its application, an order was made granting that leave, *nunc pro tunc*.
2. By the present interlocutory application, the QBCC seeks an order either setting aside the Originating Application or for summary judgment in respect of the negligence claim. The sole ground on which the application is made is that this Court does not have jurisdiction to determine the claim because it is not in respect of a matter arising under a law of the Commonwealth. Forward Pack, on its own behalf and on behalf of DJ Builders, submitted that the action is within the Court’s jurisdiction because it is an action to recover property on behalf of an insolvent company. This, so it said, brought the matter within the jurisdiction of the Court consequent upon its connection with the *Corporations Act 2001* (Cth) (*Corporations Act*). It also submitted that the step which it took in obtaining leave to bring and take responsibility of the proceeding was within the Court’s jurisdiction and this attracted jurisdiction to the matter as a whole.
3. For convenience, and where appropriate in the reasons below, I will refer to both applicants simply as “Forward Pack” and to the application for leave to bring and take responsibility for the proceedings as “the Leave Application”.

## The facts

1. The factual matters relevant to the issues in question are not of a wide ambit and it is presently not necessary to consider the allegations underpinning the pleaded negligence claim. It was common ground that DJ Builders’ claim against the QBCC is a common law negligence claim and, of itself, contains no federal element. The gravamen of the allegations of negligence relate to the manner in which the QBCC exercised its powers when undertaking a financial audit of DJ Builders for the purpose of ascertaining whether the company met certain statutory “minimum financial requirements”. It is alleged that the regulator’s failure to exercise those powers appropriately resulted in the suspension of the company’s building licence. It is further alleged that the consequence of that suspension was DJ Builders’ loss of its undertaking and insolvency, with the ultimate result that it lost the value of its business.
2. The action against the QBCC was commenced in this Court on 4 June 2019 by the filing of an Originating Application together with a Statement of Claim. The Originating Application sought, by way of interlocutory relief, leave *nunc pro tunc* for Forward Pack to bring and take responsibility of the proceedings for and on behalf of DJ Builders. That application, being the Leave Application, was heard on 13 August 2019 and reasons determining that leave should be granted were delivered on 29 November 2019: *DJ Builders & Son Pty Ltd (in liq), in the matter of DJ Builders & Son Pty Ltd (in liq) v Queensland Building and Construction Commission* [2019] FCA 2018. Substantive orders were made in relation to the application on 7 February 2020. There is no need to consider the reasons for that decision in any detail and it suffices to observe, as mentioned above, that in granting leave the Court relied upon its inherent power and necessarily so because DJ Builders was under external administration at the time. Section 237 of the *Corporations Act*, which permits certain persons to apply for leave to conduct proceedings on behalf of a company, is inapplicable in such circumstances: *Chahwan v Euphoric Pty Ltd* (2008) 245 ALR 780 (*Chahwan v Euphoric Pty Ltd*).

## The issues and the parties’ submissions

1. The QBCC’s main submission was that the cause of action in negligence advanced in Forward Pack’s Amended Statement of Claim was neither a “matter” nor part of a “matter” arising under a law made by the Commonwealth Parliament within the meaning of s 39B(1A) of the *Judiciary Act 1903* (Cth) (*Judiciary Act*). The matter for determination, so it submitted, was a common law claim for damages for negligence arising out of the performance of its obligations under a statute of the State of Queensland. In this respect, the immediate right, duty or liability to be established by the determination of the Court, namely the duty of care alleged to be owed by the QBCC to DJ Builders and the alleged liability of the regulator for breach of that duty, was said not to owe its existence to any federal law.
2. The QBCC also submitted that the mere fact Forward Pack had made an application for leave to bring and take responsibility of the action against the QBCC and co-joined itself in the Originating Application did not alter the above conclusion. It submitted that such a step was merely procedural, separate and disparate from the negligence claim, and did not arise out of the same substratum of facts.
3. In general terms, Forward Pack submitted that the proceedings are, in effect, in the nature of a liquidator’s action to recover the insolvent company’s property for the benefit of creditors and this made it a matter arising under the *Corporations Act* and so within the Court’s original jurisdiction. It also submitted, contrary to the QBCC’s submission, that the Leave Application and the negligence claim comprise a single “controversy” and thus a single “matter” in respect of which the Court had original jurisdiction.

## The relevant principles

1. There was little difference between the parties as to the general principles relevant to the identification of the nature of a “matter” for the purposes of ascertaining the existence or otherwise of federal jurisdiction.
2. The Federal Court has such original jurisdiction as is vested in it by laws made by Commonwealth Parliament: *Federal Court of Australia Act 1976* (Cth) (*Federal Court Act*), s 19. There is a general conferral of jurisdiction in s 39B(1A)(c) of the *Judiciary Act* which provides that the Court has jurisdiction in any “matter” arising under a law made by the Commonwealth Parliament.
3. The expression, “matter”, in s 39B(1A) is used in its Constitutional sense and has two elements. First, the “justiciability” requirement, meaning that there must be a justiciable controversy which is identifiable independently of the proceedings brought for its determination: *Fencott v Muller* (1983) 152 CLR 570 at 603. Second, the “subject matter” requirement, being that the subject matter, which encompasses all claims made within the scope of the controversy, must be within one of the sub-paragraphs of s 39B(1A) of the *Judiciary Act*: *CGU Insurance Limited v Blakeley* (2016) 259 CLR 339 (*CGU v Blakeley*) at 349 – 351 [24] – [27].
4. The justiciability requirement is to be distinguished from the legal proceeding brought to quell the dispute or to enforce the right, or the particular manner in which the cause or causes of action in the legal proceedings are framed: *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265. It is the controversy in which there exists some immediate right, duty or liability to be established by determination of the Court, and no such controversy exists where the parties are merely seeking an advisory opinion: *Palmer v Ayres* (2017) 259 CLR 478 at 490 – 493 [25] – [33]. This requirement is not in issue in this case.
5. The subject matter requirement of the expression “matter” is concerned with the necessary attachment of the controversy to federal law. In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, Latham CJ said of this requirement (at 154):

Thus one is compelled to the conclusion that a matter may properly be said to arise under a Federal law if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law. In either of these cases, the matter arises under the Federal law. If a right claimed is conferred by or under a Federal statute, the claim arises under the statute.

1. The question of whether the subject matter requirement is met is not dependent upon the nature of the relief sought or whether the granting of that relief depends on federal law. For instance, where the subject of a contract is a right of property which is the creation of federal law, an action on that contract will satisfy the subject matter requirement. Thus, in *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 (*LNC Industries Ltd v BMW*), the majority said (at 581):

… A claim for damages for breach or for specific performance of a contract, or a claim for relief for breach of trust, is a claim for relief of a kind which is available under State law, but if the contract or trust is in respect of a right or property which is the creation of federal law, the claim arises under federal law. The subject matter of the contract or trust in such a case exists as a result of the federal law…

1. In *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583 (*Oliver v Nine Network*), Lee J expansively articulated a number of bases on which federal jurisdiction could be attracted. His Honour referred to the passage from *LNC Industries Ltd v BMW* set out above and, without in any way deciding, queried whether it followed that if a respondent in any proceeding is a corporation the relevant “matter” must arise under a law of the Commonwealth Parliament because the ability of a corporation to be sued is conferred by and depends upon the *Corporations Act*: *Corporations Act*, s 124. See also *Hafertepen v Network Ten Pty Limited* [2020] FCA 1456 [44] where reference was made to that observation. Mr Forrest for the QBCC submitted that Lee J’s observations were too wide and should not be followed. In this respect, it is not unfair to say that Mr Ivantsoff for Forward Pack did not attempt to support his Honour’s *obiter* or did so only faintly. He submitted it was not relevant to the present case where the respondent, the QBCC, is not a corporation owing its existence to the *Corporations Act*.
2. However, Mr Forrest’s submissions were not directed solely to the proposition that if at any time a company was a respondent to a proceeding it must be within the jurisdiction of the Court. His submissions were to the effect that the reasoning process by which Lee J’s particular introspection was reached was in error. Specifically, he submitted that the essence of the above passage in *LNC Industries Ltd v BMW* from which Lee J drew his observations actually requires attention be focused on the “right or duty in question in the matter” and whether it “owes its existence to federal law or depends on federal law for its enforcement”. In *Oliver v Nine Network*, the existence of the company and its powers were irrelevant to the right or duty in question. The proceedings involved an action for defamation in which the question of the Court’s jurisdiction arose consequent upon the fact that the broadcast in question had only occurred in New South Wales. Despite that, an allegation which had been made in the statement of claim was that the broadcast had been Australia-wide and his Honour held this sufficiently attracted jurisdiction even though not ultimately made out: *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219; Allsop J, “Federal jurisdiction and the jurisdiction of the Federal Court of Australia in 2002” (2002) 23 Aust Bar Rev 29 at 45. Although Lee J’s catechism on the scope of the Court’s jurisdiction is both erudite and illuminating, the issues before his Honour did not necessitate the making of any determination as to whether jurisdiction was attracted merely by reason of the respondent being a corporation. In any event, I accept Mr Forrest’s submission that the right or duty in question in that case, being the defaming of the applicant by the respondent and the subsequent suffering of damage, did not relevantly owe its existence to the status of the defendant company as a corporation. Whilst it is true that the status of the corporate entity was necessary in order for it to be sued, that was merely part of the context in which the right, duty or liability arose. However, neither the right, duty nor liability “in question in the matter” owed their existence to the company’s status. The importance of this discussion is that it emphasises that attention must be focused on the relevant “controversy” in question rather than on the characteristics of the parties to it or the matrix of surrounding facts in which it arose. This was made explicit in *CGU Insurance Limited v Blakeley*, where the majority opined (at 349 [24]) that, “Jurisdiction with respect to a particular subject matter is authority to adjudicate upon a class of questions concerning that subject matter”. Where no question arises as to the corporate existence of a defendant, there is no relevant federal subject matter requiring an adjudication. If, however, an issue in the controversy was a purported company’s entitlement to sue by reason of a question concerning its corporate status, different issues would arise.
3. In this context, it is apt to recall the observations of the High Court in *Crouch v Commissioner for Railways* (1985) 159 CLR 22 at 37 that the concept of the expression “matter” as used in the *Judiciary Act* and the *Constitution* focuses attention on the substance of the dispute between the parties and denotes in wide terms the types of controversies which might come before a Court of Justice. Further, it is used in s 75(iv) of the *Constitution* to refer to matters between designated parties and that tends to suggest that it is the dispute rather than the parties’ characteristics which is critical. The same focus on the essentiality of the disputation or controversy can be seen in the comments of Anderson J in *RNB Equities Pty Ltd v Credit Suisse Investment Services (Australia) Ltd* (2019) 370 ALR 88 (*RNB Equities)* at 94 – 95 [19]:

The essential question under this provision (as it would be under s 39B(1A)(c) of the Judiciary Act) is whether the matter may be characterised as “arising under” the relevant federal law. A matter arises under federal law if that law is the source of the relevant right or duty, or if that law created the relevant subject matter, or if federal law provides the authority for enforcing the right or duty, or if the matter’s resolution turns on the federal law’s interpretation.

(Citations omitted).

1. Similarly, in *Rana v Google Inc* (2017) 254 FCR 1, the Full Court (Allsop CJ, Besanko and White JJ) identified a variety of ways in which a matter may arise under a law of the Commonwealth Parliament as follows (at 5 – 6 [18]):

A matter will “arise under” a law of the Parliament in a number of ways. These include cases where a cause of action is created by a Commonwealth statute; where a Commonwealth statute is relied upon as establishing a right to be vindicated; where a Commonwealth statute is the source of a defence that is asserted; where the subject matter of the controversy owes its existence to Commonwealth legislation — that is where the claim is in respect of or over a right which owes its existence to federal law; where it is necessary to decide whether a right or duty based on a Commonwealth statute exists even where that has not been pleaded by the parties, or where a federal issue is raised on the pleadings but it is unnecessary to decide: …

1. The common thread which runs through the several examples is that the rights, duties, or subject matter with which the controversy is concerned have their origin in or owe their existence to a law of the Commonwealth. It is, perhaps, not insignificant that their Honours did not extend the categories to cases where the existence of one or more of the parties was founded upon a relevant law even if that issue was not relevantly in dispute.
2. The circumstances of this case also raise the issue of whether the whole of the proceeding is within the Court’s jurisdiction because the overall controversy involves federal and non-federal claims. The ascertainment of whether a non-federal claim is or is not part of a larger matter is not without its difficulties. The determination of that question in any particular circumstance is assisted by those cases which consider the issue of so-called “accrued jurisdiction”. In these, the question is whether a claim, which by itself would not be within the Court’s jurisdiction, is brought within it because it is part of a “matter” which includes a claim arising under federal law. This was addressed in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (*Re Wakim*). In the reasons of Gummow and Hayne JJ, their Honours observed that the question of what constitutes a single controversy “depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships”: at 585 – 586 [140] quoting *Fencott v Muller* at 607. In that respect, their Honours continued (at 585 – 586 [140] – [141]):

140. … There is but a single matter if different claims arise out of “common transactions and facts” or “a common substratum of facts” notwithstanding that the facts upon which the claims depend “do not wholly coincide”. So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other, as, for example, in the case of third party proceedings or where there are alternative claims for the same damage and the determination of one will either render the other otiose or necessitate its determination. Conversely, claims which are “completely disparate”, “completely separate and distinct” or “distinct and unrelated” are not part of the same matter.

141. Often, the conclusion that, if proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings will indicate that there is a single matter. By contrast, if the several proceedings could not have been joined in one proceeding, it is difficult to see that they could be said to constitute a single matter.

(Citations omitted).

1. Previously, in *Fencott v Muller*, a majority of the High Court had identified the concept of “common transactions and facts” as the touchstone which connects claims or causes of action within the scope of a single matter. In the application of that concept, it was said (at 607 – 608):

… it must result in leaving outside the ambit of a matter a “completely disparate claim constituting in substance a separate proceeding”, a non-federal matter which is “completely separate and distinct from the matter which attracted federal jurisdiction” or “some distinct and unrelated non-federal claim”.

(Citations omitted).

1. The proper application of these tests is not achieved merely by reference to the proceedings which are instituted by the parties in respect of the controversy, although they can be illuminated by the conduct of such proceedings and the issues raised. In the end, it is a matter of impression and of practical judgment whether the federal and non-federal claims joined in the one proceeding are within the ambit of the same matter: *Fencott v Muller* at 608.
2. In *RNB Equities*, Anderson J, after a careful and thoughtful analysis of the authorities, observed (at 98 [30]):

The above authorities make clear that this Court will have jurisdiction to hear and determine a claim, even though it raises no federal law claim, if it shares a “common substratum of facts” with a federal law claim.

1. Those comments provide a useful and accurate guide to the practical application of the tests which his Honour had referenced. I might only add that it is apparent his Honour intended the word “shares” to mean that the several causes of action have a suitable degree of commonality in their respective substratum of facts and there is no requirement that they be identical.

## Consideration

### Did insolvency change the character of the existing negligence action?

1. Mr Ivantsoff’s main submission on behalf of Forward Pack was that the liquidation of DJ Builders had the consequence of transmogrifying the negligence claim (concerning the controversy arising from the QBCC’s exercise of power) into a federal matter. This was on the basis that liquidation had the result that the pursuit of the action should now properly be characterised as the collection of the company’s property for distribution among creditors in the course of the liquidation. As the liquidation occurred under the control of the Court exercising powers granted by the *Corporations Act*, it was said to follow that the instigation and pursuit of these proceedings arose from that Act. He submitted that any action commenced by a company in the course of a winding up, regardless of its nature, was within the scope of the Federal Court’s jurisdiction. In part, he sought to support this submission by reference to the liquidator’s powers under s 477(2) of the *Corporations Act* (as well as s 506 in the case of a creditors’ voluntary winding up) to bring or defend any proceedings in the name and on behalf of the company. The effect of these submissions was that all of the justiciable controversies in which a company was involved were broadened by the liquidation process to include rights, duties or liabilities which owe their existence to federal law. Mr Ivantsoff further submitted that, as Forward Pack has been clothed with the responsibility for the prosecution of the proceedings by DJ Builders as a result of the exercise of a federal law, the matter was expanded beyond the original controversy.
2. These submissions should not be accepted. On the above authorities, it is the rights, duties or liabilities in question, which comprise the justiciable controversy, which must owe their existence to federal law or rely upon federal law for their enforcement. None of the authorities cited expressly or impliedly suggest that a matter will have the necessary federal character merely if part of the contextual circumstances in which it arises has some federal connection. That, however, is the necessary and logical conclusion of Forward Pack’s submissions. The inherent error in that is in the conflation of the circumstances of the controversy with the characteristics of the entities involved in it or with the surrounding circumstances which are not otherwise in dispute. The fact that a plaintiff company is in liquidation will generally be irrelevant to the questions concerning the subject matter upon which a court is to adjudicate in any action by or against it for damages for negligence. In most cases, the cause of action in negligence will have arisen and be complete and actionable prior to liquidation.
3. That fact that a liquidator is empowered by s 477(2) of the *Corporations Act* to bring proceedings in the company’s name does not seem to alter the scope of the controversy between the company and a third party so as to attract federal jurisdiction. In any event, it is not necessary to decide this point in this matter where the liquidator declined to exercise that power.
4. Similarly, the winding up of the plaintiff company does not alter the nature of the controversy in any more general sense as Mr Ivantsoff submitted. DJ Builders’ liquidation does not alter the nature of the controversy between it and the QBCC and nor does it metamorphose it into a broader matter involving any federal element. It does not even alter the context or surrounding circumstances in which the matter arose and it is irrelevant to the rights and liabilities of the parties *inter se*. At its highest, the fact of liquidation only alters the context in which the claim is litigated. The absence of any federal element to the action is evidenced by the fact that no question which needs to be decided in the matter requires the determination of an issue of federal law.
5. That latter conclusion also denies validity to Forward Pack’s submission that the purpose of the action against the QBCC is to recover assets to meet the demands of DJ Builders’ creditors in the context of a liquidation. The purpose for which proceedings are brought cannot alter the character of the controversy from which the action arises and it is that character which is essential to the ascertainment of federal jurisdiction.
6. For similar reasons to those identified above, that Forward Pack sought and obtained leave to bring and take responsibility for the action does not alter the nature of the character of the “matter” as between DJ Builders and the QBCC. The making of that application is even further removed from the “matter” than the issue of DJ Builders’ corporate existence. It does not alter the nature of the issues of the controversy to be determined as between DJ Builders and the QBCC. It merely goes to the identity of the party who will finance the litigation and, perhaps, provide instructions to the solicitors engaged to conduct it. None of those issues are part of or related to the justiciable controversy concerning the manner in which the QBCC exercised its statutory power in relation to DJ Builders.
7. Mr Ivantsoff further relied on the fact that the Court maintains control of corporate windings up, although it was not made clear how that might change the characteristics of the “matter” which is sought to be resolved by litigation.

### The incorporation of the Leave Application into the Originating Application

1. The Originating Application in the present matter included a claim for purported interlocutory relief by which the second applicant, Forward Pack, sought an order, pursuant to the inherent jurisdiction of the Court, that it be granted leave to bring and take responsibility for the proceedings for and on behalf of DJ Builders. Despite the existence of that claim for relief, the accompanying Statement of Claim proceeded on the basis that such leave had been given. Otherwise, the principal relief sought was the recovery of damages by DJ Builders for negligence. As originally advanced, a further claim had been made for damages for breach of contract, although that was subsequently abandoned.
2. It can be assumed for present purposes that the Leave Application involved a matter within the jurisdiction of the Federal Court as conferred by s 39B(1A)(c), because it is incidental to matters which are the subject of the Court’s jurisdiction under the *Corporations Act*: *Scott Russell Constructions Pty Ltd (In Liq) v QBCC* [2019] FCA 1378 [59]. The “matter” or controversy in the application was whether Forward Pack had the right or entitlement to bring and take responsibility for the action and, for present purposes, it can be accepted that the Court’s determination was of an immediate right, duty or liability which owed its existence to the *Corporations Act*.
3. Forward Pack submitted that the combination of the two claims in the one proceeding had the consequence that the relevant “matter” included both its claim for leave and the negligence action against the QBCC. As the authorities to which reference has been made demonstrate, the veracity of that submission falls to be considered under the umbrella of the concept of “accrued jurisdiction”, even though the use of that term has fallen from favour: see *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 585 – 586 [51] – [52]; *Rizeq v Western Australia* (2017) 262 CLR 1 at 24 [55]. In that context, it has been repeatedly observed that the joining of two claims in the one proceedings is in no way determinative of whether both are within federal jurisdiction even if one undoubtedly is. The composition of the legal proceedings is merely a matter of form even though it may be that, on occasion, the constitutive causes of action in a proceeding may be reflective of the reality that the one controversy has given rise to multiple claims which rely on a relatively coincidental substratum of facts.

#### The action was not properly constituted

1. It might first be observed that the inclusion of the Leave Application as an interlocutory matter in the Originating Application was probably somewhat inappropriate. The claim to be responsible for the conduct of the action was not, in the true sense, subsidiary (being procedural or adjectival) to the relief sought in the main proceedings, being the negligence claim: *Lauro v Minter Ellison Lawyers (No 2)* [2018] SASC 70 [81]. Properly characterised, it is likely that the relief which Forward Pack sought by the Leave Application was actually final relief. Its incorporation in the proceedings under the guise of interlocutory relief quite possibly concealed the fact that it was neither a claim against the QBCC nor one in respect of which relief was sought against that entity. Ultimately, it is not necessary to reach any definitive conclusion on that issue. The more important point is that the Leave Application did not have to be made in the action commenced against the QBCC. Forward Pack was entitled to advance it in separate proceeding, and there was no requirement that the proceedings of which it sought to bring and take responsibility were even in existence prior to its making. Similarly, the prosecution of the negligence claim did not, of itself, require the making of the Leave Application. To the extent that it exists, the claim was complete upon the suffering of damage by DJ Builders and that entity was then entitled to advance it as it saw fit. It was not in doubt that, had the company done so prior to liquidation, there would have been no matter or justiciable controversy in respect of which this Court had jurisdiction. Further, the making of the Leave Application was not necessary for the commencement of the negligence claim and the liquidator might have caused the company to pursue it had he been so minded. It was only because the liquidator has refrained from doing so that the Leave Application was made.
2. The issue of whether a claim is properly within the Court’s accrued jurisdiction because it is relevantly related to a federal claim has, in this case, some similarity with the issue of whether two causes of action by different parties might be included in the one proceeding. In this case, r 9.02 of the *Federal Court Rules 2011* (Cth) (the Rules) provides:

**9.02 Joinder of parties—general**

An application may be made by 2 or more persons, or against 2 or more persons, if:

(a) a separate proceeding could be made by or against each person in which the same question of law or fact might arise for decision; and

(b) all rights to relief claimed in the proceeding (whether joint, several or alternative) arise out of the same transaction or event or series of transactions or events.

1. Subparagraph (a) does not apply because the claims of Forward Pack and DJ Builders as against the QBCC do not raise the same question of law or fact for determination. Similarly, the claims for relief do not arise out of the same transaction, events, or series of transactions or events. Forward Pack’s claim was solely for leave to bring and take responsibility for the proceedings and DJ Builders’ claim in negligence has no connection with it. Indeed, one might query why the Leave Application was included in the Originating Application at all, it not being a claim against the QBCC. Although the respondent to the proposed proceedings in *Chahwan v Euphoric Pty Ltd* was a respondent to the application for leave to bring those proceedings, its rights were not directly affected by it. The interested parties were the liquidator, shareholders and other creditors. Similarly, it might be doubted whether the QBCC was a proper party to Forward Pack’s Leave Application. In any event, for present purposes, there was no basis for including the two claims in the same proceedings.
2. It follows that the joinder of Forward Pack in DJ Builder’s action against the QBCC was inappropriate both in the sense that the Leave Application was not properly included as interlocutory relief and Forward Pack was not a proper party to that proceeding.

#### Whether there is, in substance, any relevant common substratum of fact?

1. Despite the foregoing, the question which nevertheless remains is whether the negligence action is sufficiently connected to the Leave Application such that, together, they constitute the one matter.
2. In *Re Wakim*, it was said that claims or causes of action constitute a single matter if they arise out of “common transactions and facts” or “a common substratum of facts”, even if the facts on which they depend do not wholly coincide. Here, the two claims have no such commonality. The controversy arising from the QBCC’s exercise of power was whole and complete prior to the commencement of DJ Builders’ winding up and long before Forward Pack sought to raise the question of whether it was entitled to bring and take responsibility for the conduct of the proceedings. Whilst it is true that Forward Pack wishes to control and advance the extant controversy between DJ Builders and the QBCC, its claim to do so does not arise out of the same transactions and facts or substratum of facts. The existence of that controversy was only part of the context in which Forward Pack’s claim arose. There was no issue in the controversy between DJ Builders and the QBCC to be determined in Forward Pack’s Leave Application. All that was relevant was the existence or potential of such a claim. It follows that the controversy between DJ Builders and the QBCC was a completely disparate claim constituting in substance a separate matter which was distinct and separate from the Leave Application.
3. The consequence of the foregoing is that the controversy or matter between DJ Builders and the QBCC is not within the scope of the jurisdiction of this Court. Of itself, it does not arise out of a law of the Commonwealth and, further, it is not within the Court’s jurisdiction as part of the same controversy or matter as Forward Pack’s Leave Application.

## Relief

1. By its interlocutory application, the QBCC sought orders pursuant to r 13.01 of the Rules that the Originating Application be set aside or that it have summary judgement on the negligence claim under s 31A of the *Federal Court Act*. Although there are, perhaps, good reasons why a party who claims that this Court does not have jurisdiction in respect of a matter might seek orders under r 13.01, it is not necessary to determine whether that rule provides the appropriate avenue of relief. Here, the Originating Application, although inappropriately constituted by the combination of completely separate claims, has been partly prosecuted and the applicants have obtained orders in respect of the Leave Application. It is not possible to set aside the originating process on which one or more final orders have been made.
2. For the reasons which have been set out above, the QBCC is, *prima facie*, entitled to summary judgment in respect of the negligence claim on the ground that this Court has no jurisdiction to determine that claim. However, no conclusion has been reached as to the merits of that claim and giving judgment on it may well create a *res judicata*. In these circumstances, Forward Pack submitted that the matter should be transferred to the Supreme Court of Queensland pursuant to s 5(4) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) (*Cross-Vesting Act*) which relevantly provides:

(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:

…

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

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

1. Mr Forrest for the QBCC submitted that this section cannot apply where the Court does not have jurisdiction in respect of the claims or causes of action which a party asks to be transferred. In support of that submission, he relied upon the *obiter* of Robertson J in *McCarthy v Federal Commissioner of Taxation* (2013) 249 FCR 140 at 151 – 152 [59] where his Honour indicated that he was not satisfied that the *Cross-Vesting Act* applies to permit a transfer where this Court does not have jurisdiction by virtue of s 39B(1A)(c) of the *Judiciary Act*. Mr Ivantsoff for Forward Pack submitted the Court had jurisdiction to transfer proceedings before it in respect of which it had no jurisdiction, but offered no analysis as to why that would be so.
2. Despite the absence of any substantial submissions on the issue, I am of the opinion that this Court may transfer a proceeding even though it has determined that a claim sought to be advanced does not relate to a matter within the Court’s jurisdiction. Although the Court has no jurisdiction to determine the matter, it has power to deal with proceedings which have been filed in the Court including to dismiss them or give judgment on them. Equally, it must have power to transfer them under the *Cross-Vesting Act* if the circumstances warrant it. In any event, here the proceedings combined (albeit inappropriately) two matters, one of which was within jurisdiction. That being so, it cannot be said that they are a nullity or wholly inutile and nor can it be said that there is nothing to transfer.
3. The Supreme Court of Queensland is a more appropriate forum for the determination of the proceedings and, undoubtedly, has jurisdiction to hear it even if it might transfer it to the District Court were an application made. Further, transferring the proceedings would entail a saving of time and costs which would otherwise be wasted if the applicants were to be required to commence the action again. It is relevant in this context that the limitation period in respect of the negligence claim has not expired with the consequence that there would be nothing to prevent the applicants commencing new proceedings in the Supreme Court. However, it would be inconsistent with the Court’s desire to see litigation resolved at a minimum of cost to refuse to transfer the proceedings in this case and orders to that effect should be made.
4. That aside, the QBCC has succeeded on the substance of its application and, in the circumstances, the appropriate relief is the making of a declaration that this Court has no jurisdiction with respect to the negligence claim.

## Costs

1. The QBCC has had substantial success and is entitled to an order that Forward Pack and DJ Builders pay its costs of the interlocutory application.
2. It is also convenient to note here that, in accordance with the orders that Reeves J made in this matter on 7 February 2020, Forward Pack and one of its directors, Mr Doré, paid money into Court as security for an order that they indemnify DJ Builders against all costs, charges and expenses of this proceeding. Those funds have been disbursed in part. Presumably, the parties will wish to seek orders concerning the remainder. They may do so by application to the Registrar: *Federal Court Act*, s 35A(1)(h); Rules, Sch 2, Item 106.

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| I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 31 August 2021