

# FEDERAL COURT OF AUSTRALIA

## **Jowene Pty Limited atf Biro Citer Souvenirs Pty Limited Pension Fund v Downer EDI Limited [2023] FCA 924**

File number(s): NSD 293 of 2023  
NSD 427 of 2023  
NSD 520 of 2023

Judgment of: **HALLEY J**

Date of judgment: 7 August 2023

Catchwords: **PRACTICE AND PROCEDURE** – cross-vesting – application to transfer three open class action proceedings to the Supreme Court of Victoria – application not opposed by respondent – *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) s 5(4) – *Corporations Act 2001* (Cth) s 1337H(2) – whether in the interests of justice – whether Supreme Court of Victoria is the “natural forum” – application granted

Legislation: *Corporations Act 2001* (Cth) ss 674, 674A, 1041E, 1041H, 1337H  
*Australian Securities and Investments Commission Act 2001* (Cth) s 12DA  
*Competition and Consumer Act 2010* (Cth) Sch 2 (*Australian Consumer Law*) s 18  
*Jurisdiction of Courts (Cross Vesting) Act 1987* (Cth) s 5(4)  
*Supreme Court Act 1986* (Vic) s 33ZDA

Cases cited: *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400; [2004] HCA 61  
*Gleeson v Bank of Queensland* [2017] FCA 1302  
*Valceski v Valceski* (2007) 70 NSWLR 36; [2007] NSWSC 440

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Commercial Contracts, Banking, Finance and Insurance

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## ORDERS

NSD 293 of 2023

**BETWEEN:**            **JOWENE PTY LIMITED (ACN 001 714 585) ATF BIRO  
CITER SOUVENIRS PTY LIMITED PENSION FUND**  
Applicant

**AND:**                **DOWNER EDI LIMITED (ACN 003 872 848)**  
Respondent

**ORDER MADE BY:**   **HALLEY J**

**DATE OF ORDER:**   **7 AUGUST 2023**

### **THE COURT ORDERS THAT:**

1.     The whole of these proceedings, NSD 293 of 2023, be transferred to the Supreme Court of Victoria pursuant to s 5(4) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).

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

## ORDERS

NSD 427 of 2023

**BETWEEN:**            **TIMOTHY HUI CHONG TEOH**  
First Applicant

**PETER HERMANN ECKARDT**  
Second Applicant

**AND:**                **DOWNER EDI LIMITED (ACN 003 872 848)**  
Respondent

**ORDER MADE BY:**   **HALLEY J**

**DATE OF ORDER:**   **7 AUGUST 2023**

### **THE COURT ORDERS THAT:**

1.        The whole of these proceedings, NSD 427 of 2023, be transferred to the Supreme Court of Victoria pursuant to s 5(4) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).

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

## ORDERS

NSD 520 of 2023

**BETWEEN:**           **KAJULA PTY LTD ACN 065 474 713**  
Applicant

**AND:**                 **DOWNER EDI LTD ACN 003 872 848**  
Respondent

**ORDER MADE BY:** **HALLEY J**

**DATE OF ORDER:** **7 AUGUST 2023**

### **THE COURT ORDERS THAT:**

1.       The whole of these proceedings, NSD 520 of 2023, be transferred to the Supreme Court of Victoria pursuant to s 5(4) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).

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

## REASONS FOR JUDGMENT

### HALLEY J:

1 The applicants in three open class action proceedings brought against Downer EDI Limited (**Downer**) seek orders that each proceeding be transferred to the Supreme Court of Victoria. The applications are not opposed by Downer.

2 The three proceedings were respectively commenced by:

(a) Jowene Pty Limited atf Biro Citer Souvenirs Pty Limited Pension Fund (NSD 293 of 2023) (**Jowene proceeding**);

(b) Timothy Hui Chong Teoh and another (NSD 427 of 2023) (**Teoh proceeding**); and

(c) Kajula Pty Ltd (NSD 520 of 2023) (**Kajula proceeding**),

(together, the **Federal Court class actions**).

3 In each of the Federal Court class actions and in an open class action proceeding commenced by Justine Lidgett and Cameron Lidgett against Downer in the Supreme Court of Victoria

(S ECI 2023 01835) (**Lidgett proceeding**), the applicants allege that in the period from 1 April 2020 until a final corrective disclosure on 27 February 2023, Downer, a listed company, variously contravened s 674, s 674A, s 1041E and s 1041H of the *Corporations Act 2001* (Cth) (**Corporations Act**), s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and s 18 of the *Australian Consumer Law* being Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**). The conduct said to give rise to those breaches includes:

(a) failures by Downer to disclose to the market that it had misapplied its revenue recognition policy to a contract executed with Ausnet Services in July 2019 which resulted in inflated revenue/earnings being reported for the 2020-2022 financial years;

(b) publishing accounts (including *pro forma* accounts for a 1 July 2020 capital raising) that misrepresented its financial position, the robustness of its financial reporting systems, and the success of its “Urban Services Strategy”; and

(c) issuing earnings guidance for the 2023 financial year prior to the conclusion of its investigation into its accounting error and without a reasonable basis.

4 The three proceedings in this Court and the Lidgett proceeding, give rise to what is typically referred to as a “multiplicity issue”. The Federal Court class actions and Lidgett proceedings were each commenced against Downer, a common defendant, at the same or a similar time. Each of the proceedings also concern overlapping allegations of contraventions by Downer of provisions of the Corporations Act, ASIC Act and the ACL arising out of the same or similar conduct, as outlined above at [3].

5 The Federal Court class actions together with the Lidgett proceeding have, to date, been jointly case managed by judges of this Court and the Supreme Court of Victoria pursuant to the “Protocol for Communication and Cooperation between the Supreme Court of Victoria and Federal Court of Australia in Class Action Proceedings” dated 5 June 2019 (**Protocol**).

6 The overarching objective of the Protocol is stated to be to facilitate the efficiency and effectiveness of class action proceedings in circumstances where multiple proceedings are brought in competing Courts across more than one jurisdiction. The Protocol provides that the Federal Court and the Supreme Court of Victoria should aim to:

[P]romote the efficient and timely coordination and administration of competing class action proceedings in the most convenient and appropriate jurisdiction having regard to: the issues raised in the respective proceedings; the interests of the parties and group members in the respective proceedings; the minimisation of costs and inconvenience to the parties associated with the existence of competing class action proceedings; the management of the competing class action proceedings in ways that are proportionate to the size and nature of the respective classes, the complexity of the issues, the nature of the proceedings, and the number of jurisdictions involved. At all times, the interests of justice are paramount.

7 Orders were made in each proceeding on 12 July 2023 at a joint case management hearing. The orders provided for a timetable to serve evidence in relation to the various interlocutory applications that the parties had filed to address the multiplicity issue and listed the applications for a joint hearing before this Court and the Supreme Court of Victoria on 28 and 29 August and 6 September 2023.

8 As at 12 July 2023, the applicants in the Jowene proceeding and the Teoh proceeding had filed interlocutory applications seeking orders for (a) the transfer of those proceedings to the Supreme Court of Victoria pursuant to s 5(4) of the *Jurisdiction of Courts (Cross Vesting) Act 1987* (Cth) (**Cross Vesting Act**), or s 1337H(2) of the Corporations Act, (b) a consolidation of the proceedings with the Lidgett proceeding, and (c) a permanent stay of the Kajula proceeding. As at that date, the applicants in the Kajula proceeding had filed an

interlocutory application seeking a permanent stay of the Jowene proceeding and the Teoh proceeding.

9 The applicants in the Kajula proceeding subsequently also filed an interlocutory application dated 28 July 2023 seeking an order that the proceeding be transferred to the Supreme Court of Victoria pursuant to s 1337H(2) of the Corporations Act and/or s 5(4) of the Cross Vesting Act.

10 The applicants in each of the Federal Court class actions have now asked this Court to determine the applications for transfer of their respective proceedings and the parties have indicated that they are content for the application to be determined on the papers. Given the absence of any opposition to the transfer applications, I was prepared to determine the matter on the papers.

11 Section 5(4) of the Cross Vesting Act provides:

**5 Transfer of proceedings**

(4) Where:

- (a) a proceeding (in this subsection referred to as the *relevant proceeding*) is pending in the Federal Court or the Federal Circuit and Family Court of Australia (Division 1) (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 a State or Territory and it is more appropriate that the relevant proceeding be determined by that 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 this Act and any law of the Australian Capital Territory or the Northern Territory 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 of a State or Territory, apart from this Act and any law of a State or Territory 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 or Territory referred to in sub-subparagraph (B) and not within the jurisdiction of the first court apart from this Act and any law of the Australian Capital Territory or the Northern Territory relating to cross-vesting of jurisdiction; and

(D) the interests of justice;

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

(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.

12 Section 1337H of the Corporations Act relevantly provides:

**1337H Transfer of proceedings by the Federal Court and State and Territory Supreme Courts**

(1) This section applies to a proceeding (the *relevant proceeding*) in a court (the *transferor court*) if:

(a) the relevant proceeding is:

(i) a proceeding with respect to a civil matter arising under the Corporations legislation; or

(ii) a subsection 1337B(3) proceeding; and

(b) the transferor court is:

(i) the Federal Court; or

(ii) a State or Territory Supreme Court.

(2) Subject to subsections (3), (4) and (5), if it appears to the transferor court that, having regard to the interests of justice, it is more appropriate for:

(a) the relevant proceeding; or

(b) an application in the relevant proceeding;

to be determined by another court that has jurisdiction in the matters for determination in the relevant proceeding or application, the transferor court may transfer the relevant proceeding or application to that other court.

13 Both s 5(4) of the Cross Vesting Act and s 1337H of the Corporations Act are directed at the interests of justice. The interests of justice are determined by objective factors, rather than the selection of the “most advantageous, or least disadvantageous, forum for one of them”. The relevant task is to identify what has been described as the “natural forum” with its concomitant advantages and disadvantages for each party: *Valceski v Valceski* (2007) 70

NSWLR 36; [2007] NSWSC 440 at [69] (Brereton J); see *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400; [2004] HCA 61 at [14] (Gleeson CJ, McHugh and Heydon JJ), [63] (Gummow J); see also *Gleeson v Bank of Queensland* [2017] FCA 1302 at [15]-[21] (Bromwich J).

14 This Court and the Supreme Court of Victoria both have extensive procedures and provisions providing for the hearing and resolution of class action proceedings. In addition, the Supreme Court has the ability to make a “Group Costs Order” (**GCO**) pursuant to s 33ZDA of the *Supreme Court Act 1986* (Vic). Given that, in each of the Federal Court class actions the applicants now seek a transfer of their proceedings to the Supreme Court of Victoria and those transfers are not opposed by Downer, it is not necessary or desirable, particularly in the absence of a contradictor, to express any view on whether this Court is able to make an order that is equivalent to a GCO in a class action proceeding.

15 Consistently with the Protocol, the transfer of the each of the three Federal Court class actions will facilitate a more expeditious and less complicated resolution of the multiplicity issue and avoid any potential inconsistencies that might arise in the course of a joint determination of the issue by judges of this Court and the Supreme Court of Victoria.

16 For the foregoing reasons, I am satisfied that in each of the Federal Court class actions, orders should be made pursuant to s 5(4) of the Cross Vesting Act transferring each proceeding to the Supreme Court of Victoria. I note, for completeness, that in this case, the transfers could relevantly have been made under either s 5(4) of the Cross Vesting Act or s 1337H(2) of the Corporations Act.

17 I note that the parties do not seek any specific costs orders in relation to the applications to transfer their respective proceedings to the Supreme Court of Victoria.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Halley.

Associate:

Dated: 7 August 2023