
CANADA / JUDGMENT

Dollinger v. Starke

2020 BCSC 1574

COURT

Supreme Court of British Columbia

DECIDED

26 October 2020

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2020 BCSC 1574 Dollinger v. Starke

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dollinger v. Starke,

2020 BCSC 1574

Date: 20201026

Docket: S1912440

Registry: Vancouver

Between:

Sean Dollinger

Plaintiff

And

Cliff Starke

Defendant

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for the Plaintiff:

M.P. Larsen

Counsel for the Defendant:

D. Debssou

Place and Date of Hearing:

Vancouver, B.C.

August 26, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 26, 2020

introduction

[1] The defendant applicant, Cliff Starke (the "defendant"), seeks an order dismissing or permanently staying the action on the basis that British Columbia does not have jurisdiction over the defendant in relation to the within cause of action. The underlying cause of action is a breach of a share transfer agreement. In the alternative, the defendant seeks an order dismissing or permanently staying the action on the basis that British Columbia is a forum non conveniens and is not the most appropriate forum for resolution of the matters.

the factual basis

- [2] The plaintiff respondent, Sean Dollinger (the "plaintiff"), brought a claim against the defendant in respect of a share transfer agreement. The claim was filed in the Vancouver Registry on November 4, 2019. In the claim, it is alleged that, on or about January 18, 2018, the defendant entered into a share purchase agreement with the plaintiff (the "Agreement") to satisfy certain loans previously made by the plaintiff to the defendant.
- [3] The plaintiff alleges that, pursuant to the terms of the Agreement, the defendant failed to transfer 50,000 shares of the common stock of Nuuvera Inc. ("Nuuvera"). At the time of the Agreement, Nuuvera was a federally registered corporation located in Ontario and on March 2018, Nuuvera was acquired by Aphria Inc., a publicly traded Canadian company also headquartered in Ontario.
- [4] The Agreement sets out that "[t]his agreement shall be governed where applicable by federal Canadian law and provincial laws of Ontario, Canada". There is, however, no choice of forum clause.

the issue

- [5] The defendant claims that he is not resident in British Columbia and, instead, is a permanent resident of the Republic of Panama. Attached to his affidavit filed August 13, 2020, was a copy of his permanent resident card issued by the Government of the Republic of Panama that expires March 1, 2029. In his affidavit before the Court, the defendant provided his driver's licence, issued by the Republic of Panama and set to expire October 5, 2023, and a resident utility bill setting out his current residence in the Republic of Panama, as further evidence of his residency in Panama.

- [6] The defendant states that at the time of the signing of the Agreement, the plaintiff was resident in Florida. The defendant says that he did not sign the Agreement in British Columbia. He says that he received a copy of the Agreement signed by the plaintiff while he was in Ontario.
- [7] Also before the Court were the affidavits of Farhan Lalani ("Mr. Lalani") and Alison Lalani ("Ms. Lalani"). Mr. Lalani deposed that he is a business associate of the defendant and that the property located at Heritage Boulevard in North Vancouver ("Heritage") is leased by a tenant named Georgia Sandrin from Mr. Lalani's father, Barkat Lalani. Ms. Lalani deposes that Barkat Lalani "primarily owns" the Heritage property.
- [8] Mr. Lalani deposed that, while the defendant is Ms. Sandrin's partner, to his knowledge, they do not live together at the address. Mr. Lalani stated that due to travel and business affairs of the defendant, the defendant "does not regularly reside at the Address." Mr. Lalani stated that he has only seen the defendant on two occasions in the last twelve months.
- [9] Mr. Lalani deposed that he is a director and founder of Franchise Cannabis Corporation ("Franchise") with its head office located in Toronto. Mr. Lalani deposed that, while there is an address for Franchise in Vancouver, as noted on Franchise's website, it is only because he currently lives in Vancouver. Mr. Lalani stated that Franchise does not regularly conduct business or meetings in Vancouver.
- [10] Ms. Lalani deposed that she is an acquaintance of the defendant. She swore an affidavit in response to an affidavit sworn and filed by Jennifer Kraeutner on behalf of the plaintiff.
- [11] Ms. Kraeutner is an office manager working for Eagle Eye Locators. She deposed that they spoke to Ms. Lalani by telephone on August 6, 2020. In that call, Ms. Lalani stated that the defendant and Ms. Sandrin are best friends with her (Ms. Lalani) and her husband (Mr. Lalani), and that both Mr. and Ms. Lalani knew that the defendant and Ms. Sandrin reside at Heritage.
- [12] In response to Ms. Kraeutner's affidavit, Ms. Lalani indicated that she did not speak with Ms. Kraeutner "in any capacity during this call." However, Ms. Lalani did indicate that she provided the full mailing address of Ms. Sandrin's residence to another individual who called, in order to assist with the delivery of a package for the defendant.
- [13] The plaintiff deposed that that he is acquainted with Mr. Lalani and that the defendant is renting Heritage from Mr. Lalani.
- [14] The plaintiff also deposed that the defendant is listed as a president and CEO of Franchise as disclosed on Franchise's website. A screenshot of the website was attached as an exhibit to the affidavit. The website also notes that Franchise has a head office on West Hastings Street, Vancouver, and confirms the defendant as president and CEO.

legal basis

[15] The defendant seeks to have this matter stayed on the basis that the British Columbia Supreme Court does not have territorial jurisdiction.

[16] It is settled law that s. 3 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA] governs this matter, which sets out:

Proceedings against a person

3 A court has territorial competence in a proceeding that is brought against a person only if

- (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
- (b) during the course of the proceeding that person submits to the court's jurisdiction,
- (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
- (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
- (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[17] Section 10 of the CJPTA sets out in greater detail the factors suggesting a real and substantial connection :

Real and substantial connection

10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

- (e) concerns contractual obligations, and
 - (i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,
 - (ii) by its express terms, the contract is governed by the law of British Columbia, or
 - (iii) the contract
- (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
- (B) resulted from a solicitation of business in British Columbia by or on behalf of the seller,

Analysis

Section 3(c) of the CJPTA

- [18] The agreement in place before the Court is silent on whether a particular court has jurisdiction in this matter. There is an agreement with respect to the governing laws, being federal Canadian law and the provincial law of Ontario, but the relevant clause is not a forum selection clause. Accordingly, I find this to be a neutral factor.

Sections 3(e) and 10 of the CJPTA

- [19] As previously noted, the Agreement, by its terms, is governed by federal Canadian law and provincial law of Ontario. I find accordingly that this is a neutral factor.
- [20] Additionally, neither party was in British Columbia when the Agreement was entered into. The plaintiff signed the Agreement in Florida while the defendant signed the agreement in Ontario and received the acceptance in Ontario.

Section 3(d) of CJPTA

- [21] The real issue before the Court, accordingly, is the residency of the parties and whether s. 3(d) of the CJPTA is applicable. The analysis into territorial competence "starts with an examination of the plaintiff's pleadings": *Original Cakerie Ltd. v. Renaud*, 2013 BCSC 755 at para. 22. The Court's objective is to determine whether there are facts alleged that, if true, would ground jurisdiction simpliciter: *Environmental Packaging Technologies Ltd. v. Rudjuk*, 2012 BCCA 343 at para. 26.
- [22] Both parties have submitted to me the same authority on the issue of residency. The defendant relies upon the definition of "ordinarily resident" in *Thomson v. Canada (Minister of National Revenue)*, 1946 S.C.R. 209 at para. 71:

A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question.

In *Thomson*, the court was considering the terms "ordinarily resident" versus "sojourns". Here, the defendant sets out that he was not ordinarily resident in British Columbia.

- [23] While the defendant deposes he has not been "ordinarily resident" in British Columbia, the recent decision of *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 addresses a framework for analyzing jurisdictional challenges and territorial competence in British Columbia. In *Ewert*, the court considered s. 3(e) of the CJPTA. The plaintiff asks me to apply that framework here, to s. 3(d).
- [24] I am inclined to do so. The root of the approach in *Ewert* has been applied to s. 3(c) by this Court recently in *Buhler v Lewis*, 2020 BCSC 485 at para 14. The Court of Appeal recently approved the application of the "good arguable case" threshold to a s. 3(d) analysis when it upheld that portion of the trial judge's reasoning in *Zhao v. Zhou*, 2019 BCCA 12 at paras. 15-19. Despite the defendant's ordinary residence in British Columbia being "disputed and thinly supported", the trial judge nonetheless found sufficient support to satisfy the "arguable case" threshold: *Zhao v. Zhou*, 2019 BCCA 12 at para. 16. The Court of Appeal did not disturb this finding or approach.
- [25] The party advancing territorial competence must show that one of the enumerated connecting factors in the CJPTA exists. The jurisdictional facts pleaded in the plaintiff's claim are taken to be true. As described in *Ewert*:
- [16] At the first stage of the analysis, the plaintiff must show that one of the connecting factors listed in s. 10 exists. The basic jurisdictional facts relied on by the plaintiff are taken to be true if pleaded (sometimes referred to as a presumption that the pleaded facts are true). The defendant challenging jurisdiction is entitled to contest the pleaded facts with evidence. If the defendant contests the pleaded facts with evidence, the plaintiff is required only to show that there is a good arguable case that the pleaded facts can be proven. The role of the chambers judge is not to prematurely decide the merits of the case or to determine whether the pleaded facts are proven on a balance of probabilities; the plaintiff's burden is low: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 34; *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 20, leave to appeal ref'd (2013), [2012] S.C.C.A. No. 367 [Fairhurst]; *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 343 at para. 26.
- [26] Evidence can be lead to challenge pleaded jurisdictional facts and, when that is the case, the plaintiff is only required to show that there is a "good arguable case" that the pleaded jurisdictional facts can be proven. This is a low burden and should not be an exercise in prematurely deciding whether the pleaded facts are proven on a balance of probabilities.
- [27] If it is so pleaded, there is a mandatory presumption that there is a real and substantial connection and, therefore, territorial competence exists. This is a strong presumption that is likely determinative. The court will then turn to the second stage. As noted by the Court of Appeal in *Ewert*, if a connecting factor is established by unrebutted pleadings, or a good arguable case, the mandatory presumption of territorial competence is triggered:

- [17] At the second stage, if one of the connecting factors is established either on undisputed pleadings or on disputed pleadings but with a good arguable case, the "mandatory presumption" of a real and substantial connection (and, therefore, territorial competence) is triggered: *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para. 20, leave to appeal ref'd [2010] S.C.C.A. No. 68 [Stanway]. This is, of course, distinct from the "presumption" that pleaded facts are true. At this stage, because the connecting factor has already been established, it is presumed that a real and substantial connection exists, and therefore that the court has territorial competence. The defendant may now attempt to rebut the presumption of real and substantial connection by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": *Van Breda* at para. 95; *Canadian Olympic* at para. 24. However, the presumption is strong and "likely to be determinative": *Stanway* at paras. 20-22. The burden on the defendant to rebut the presumption is heavy: *Fairhurst* at paras. 32, 42; *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at para. 35, aff'd 2015 BCCA 200; *Mazarei v. Icon Omega Developments Ltd.*, 2011 BCSC 259 at para. 33. At this stage of the analysis, a connecting factor is already established: the defendant's task is to show why a real and substantial connection does not follow, despite the strong presumption that it does.
- [28] While this presumption can be rebutted by the establishment of facts that demonstrate the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum, or points only to a weak relationship between them, no such facts have been placed before this Court.
- [29] Here, rather than the pleaded facts going to a connecting factor, instead we are considering the issue of the residency of the plaintiff in the context of s. 3(d) of the CJPTA.
- [30] As I mentioned, the plaintiff also notes that Thomson continues to be applied to determine the meaning of "ordinarily resident" in s. 3(d) of the CJPTA and cites *Broad v. Pavlis*, 2015 BCCA 20. In that decision, the Court extensively discusses how and why a person may be "ordinarily resident" in multiple places at the same time:
- [34] In finding jurisdiction, Mr. Justice Doherty, for a unanimous court, relied in part on the presumptive connecting factor of ordinary residence (at para. 27). Like the chambers judge in this proceeding, Doherty J.A. noted the conclusion in Thomson that a person can be ordinarily resident in more than one place, and found that persuasive in light of the type of lifestyle lived by the claimant and the respondent (at paras. 31-32). Specifically, Doherty J.A. referenced Estey J.'s statement in Thomson that "[i]t would appear that the appellant was maintaining more than one residence to which he could and did come and go as he pleased" (at 231). Mr. Justice Doherty cited with approval the chambers judge's conclusion that the couple resided in Ontario "on a regular basis for part of every year, for months at a stretch, for more than five years. That amounts to 'ordinary residence'" (at para. 31).

- [35] Knowles [v. Linddraws, 2014 ONCA 116] draws on Thomson to find that a type of lifestyle may be more conducive to finding a person ordinarily resident in more than one location. This lifestyle is one of a person with significant financial means who maintains residences in more than one place as part of their normal course of living.
- [36] This appears to mirror, albeit on a smaller financial scale, the circumstances in these proceedings. There is no dispute that the appellant is ordinarily resident in Alberta. The appellant also has a residence in B.C. in which "he regularly, normally and customarily lives" during relatively lengthy vacation periods. It is not a residence "where he unusually, casually or intermittently visits or stays". It is part of the "settled routine of his life" to spend months of each year at the West Kelowna house.

The facts before the Court

- [31] The plaintiff has pleaded that the defendant resides in British Columbia as set out in the notice of civil claim.
- [32] The defendant, while not a named tenant of Heritage in North Vancouver, does not dispute that his partner, Ms. Sandrin, is renting the unit. While it is in dispute by Ms. Lalani that she indicated that the defendant was renting Heritage, she does not dispute that she indicated that Heritage would be a place where a package would be able to get to him. I note that the defendant is listed as CEO of Franchise, whose website sets out the head office is located at West Hastings Street, Vancouver.
- [33] What is essentially before me is a factual dispute: did the plaintiff discharge his burden to meet--the threshold of a "good arguable case"--through his evidence of the defendant's residency status in British Columbia? I find that there has been an establishment of residency for the purposes of grounding jurisdiction simpliciter. I find that, on the evidence that has been produced, there has been the establishment of an arguable case of residency of the defendant in British Columbia given the pleadings and the inferences to be drawn from the available evidence: that he has worked in Vancouver and that he has been here living in North Vancouver with his partner.
- [34] The defendant's evidence rebutting this claim focuses largely on the defendant's connection to Panama. All that I may discern from the defendant's evidence on this point is that he has been a permanent resident there since 2019 and in 2020 has a residential address at which he pays for internet, cable and a telephone. As the cases I have previously discussed demonstrate, it is quite possible for someone to be ordinarily resident in multiple jurisdictions. Furthermore, evidence of attachment to a second jurisdiction does not adequately rebut connection to a first jurisdiction: *Sampson v. BC*, 2018 BCSC 1503 at para. 108. The defendant's denial that he is the named tenant at the Heritage are irrelevant to the issue of ordinary residency. While the defendant denies that he is, or has been, a resident of British Columbia, he does not provide the Court with sufficient pleadings to rebut the plaintiff's claim of his residency here.

[35] I find that the plaintiff has met the "good arguable case" threshold and, for the purposes of the jurisdictional analysis, the defendant was ordinarily resident in British Columbia when the claim was commenced in November 2019. Accordingly, pursuant to s. 3(d) of the CJPTA, the courts have territorial competence over the claim.

British Columbia as the most convenient forum

[36] Having determined jurisdiction simpliciter, I now turn to address the defendant's argument that British Columbia is forum non conveniens. In British Columbia, the test has been legislated by s. 11(2) of the CJPTA, that sets out:

Discretion as to the exercise of territorial competence

11

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
- (b) the law to be applied to issues in the proceeding,
- (c) the desirability of avoiding multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and
- (f) the fair and efficient working of the Canadian legal system as a whole.

[37] An analysis of convenient forum can begin by stating that the plaintiff has a prima facie right to proceed in their chosen forum and that the defendant asking the Court to exercise its discretion to decline jurisdiction has an onus to meet; *Wang v. Sun*, 2014 BCSC 87:

[52] In considering this issue, I start with the proposition that a plaintiff has a prima facie right to proceed in his or her chosen forum and that a defendant asking the court to exercise its discretion to decline jurisdiction has a significant onus to meet.

[38] The test for forum non-convenience is set out at s. 11 of the CJPTA. While s. 11 is a complete codification of the former common law test for forum non conveniens, it is understood that factors in s.11(2) are non-exhaustive and are to be supplemented, where appropriate: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.

[39] Additional factors were set out in *JTG Management Services Inc. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA, which included:

- a) where each party resides;

- b) where each party carries on business;
- c) where the cause of action arose;
- d) where the loss or damage occurred;
- e) any juridical advantage to the plaintiff in this jurisdiction;
- f) any juridical disadvantage to the defendant in this jurisdiction;
- g) the convenience or inconvenience to potential witness;
- h) the cost of conducting the proceeding in this jurisdiction;
- i) the applicable substantive law;
- j) the difficulty and cost of providing foreign law, if necessary; and,
- k) where there are parallel proceedings in any other jurisdiction.

- [40] In order to convince the Court that it should decline to exercise its jurisdiction, the party seeking the order should demonstrate that the alternative forum is clearly more appropriate. Here the defendant cites only three distinct reasons: the choice of law clause in the Agreement, the respective residencies of the parties at present and during the contract formation, and the corporate residency of Nuuvera and its acquirer, Aphria, Inc.
- [41] The plaintiff submits that British Columbia is a more convenient forum as both parties currently reside in British Columbia and the current pandemic makes travel to other jurisdictions advanced by the defendant, such as Ontario and Florida, socially irresponsible.
- [42] The plaintiff also argues that it is not difficult for the British Columbia Court to apply the provincial law of Ontario or federal Canadian law and that significant resources and time have already been expended. As well, given the defendant's current residency in British Columbia, the enforcement of monetary judgment would likely occur against his assets located in British Columbia.
- [43] The plaintiff also notes that the distinction between a choice of law and a jurisdiction clause.
- [44] The issue of the choice of law clause in the Agreement becomes particularly relevant at this stage of the analysis. The defendant advances that this clause should weigh in his favour in the forum non conveniens test. I disagree. The common law of contracts in Ontario is "essentially the same" as that of British Columbia and there is little difficulty in this Court interpreting Ontario law: *Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Incorporated*, 2014 BCSC 752 at para. 48; *180 University Residential Limited Partnership v. Yours Asia Corp.* 2015 BCSC 289 at paras. 29-31. Consequently, I find it is not a decisive factor in the forum non conveniens analysis. No juridical advantage is conferred on the plaintiff by bringing his cause of action in British Columbia.

- [45] Furthermore, nothing has been put before me to suggest that there are concurrent proceedings on this matter in Ontario, or for that matter, in any other jurisdiction.
- [46] Returning to the s. 11(2) factors, I am inclined to agree with the plaintiff that the expense and convenience factors weigh in favour of British Columbia exercising jurisdiction over this matter.

findings

- [47] I find that territorial jurisdiction has been established through s. 3(d) residency factor of the CJPTA. I also find that the defendant has failed to show that another jurisdiction is a clearly more appropriate forum for this proceeding. British Columbia is a convenient forum for this matter and there will be no difficulty for the Court in applying the provincial law of Ontario or federal Canadian law.

"Maisonville J."

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