

CANADA / JUDGMENT

DropLo Management Group Ltd. v. Howard

2015 BCSC 1102

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Supreme Court of British Columbia

DECIDED

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2015 BCSC 1102 DropLo Management Group Ltd. v. Howard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

DropLo Management Group Ltd. v. Howard,

2015 BCSC 1102

Date: 20150626

Docket: S144187

Registry: Vancouver

Between:

DropLo Management Group Ltd.

Plaintiff

And:

Peter James Howard, Joe Doe, Jane Doe, Richard Roe, #1 Doe Corporation, #2 Doe Corporation,
and #3 Doe Corporation

Defendants

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Plaintiff:

David F. Sutherland

Counsel for the Defendant

Peter James Howard:

William C. Kaplan, Q.C. and

Mathew P. Good

Place and Date of Hearing:

Vancouver, B.C.

May 25, 2015

Written Submissions received:

May 28 and 29, 2015

Place and Date of Judgment:

Vancouver, B.C.

June 26, 2015

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Introduction

- [1] This is an application by the defendant Peter James Howard for dismissal of this action on the grounds that the B.C. court has no jurisdiction. Alternatively, if the court has jurisdiction, Mr. Howard seeks a stay of proceedings on the grounds that B.C. is not the appropriate forum. Mr. Howard relies on Rule 21-8 of the Supreme Court Civil Rules and the provisions of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 (the "CJPTA").
- [2] The plaintiff says that the application must be dismissed. It says it has alleged facts and provided prima facie proof sufficient to establish a real and substantial connection with B.C., and that Mr. Howard has not met his burden to show that there is a more appropriate forum than B.C.

The Claims

- [3] The plaintiff, DropLo Management Group Ltd., is a B.C. company. It is alleged to be the assignee of the interests of Sean Oldham, who is alleged to be a shareholder in Forward Music Limited ("Forward"). DropLo is also alleged to be the assignee of the interests of Tony Calder, who is alleged to be a shareholder in Andes Music Limited ("Andes").
- [4] There is no dispute that both Forward and Andes were companies incorporated in the U.K. in 1964. There is also no dispute (and, in fact, DropLo alleges) that both companies were dissolved in 1983.
- [5] Mr. Howard is the only defendant identified by name in the notice of civil claim (the "NCC"). He is alleged to be a businessman who carries on business in Wraysbury, England. DropLo pleads that the remaining defendants are "persons unknown" to it.
- [6] With respect to Forward, DropLo pleads in Part 1 of the NCC:
6. [Forward] was incorporated in 1964 to hold and exploit copyright assets and royalties and it held the rights to publish and did publish at least three songs by various authors:
 - a) As Tears Go By;
 - b) Greensleeves; and
 - c) Don't Touch Me.
 7. [Forward] had the rights to publish and did publish the foregoing songs and other songs from approximately 1964 until it alienated (by sale or assignment) those rights at some time unknown to the Plaintiff without the knowledge or consent of Sean Oldham and without subsequently advising Sean Oldham or accounting to him.

8. At all material times, the Defendant, Peter Howard, was a Director and Secretary of [Forward], having a duty to conduct himself and the affairs of [Forward] in the best interests of [Forward], and its shareholders and the Defendant, Peter Howard had and continues to have, at all material times, a duty to account to the shareholders in [Forward] (and their successors and assignee) for the assets and income of that corporation.
9. The assets of [Forward], until alienated included the rights to publish the songs aforesaid which rights gave rise to a substantial stream of income derived in British Columbia and Canada as publishers and similar streams of income from other jurisdictions in which publishers' royalties arise by virtue of local legislation analogous to the Copyright Act in Canada.
10. On or about December 16, 2013, the Plaintiff demanded that the Defendant provide the following information:
 - a) Please provide the full list of published songs that belong to...[Forward] that are now being administered by others; and
 - b) Please provide the details of the earnings of these songs since [Forward] stopped receiving royalty payments directly and detail in which countries those earnings were collected; and
 - c) Please provide details of any and all sub-publishing contracts [relating to] the songs of... [Forward that] have [been] entered into.
11. In breach of the duties of a Director and the Secretary of [Forward], the Defendant, Peter Howard, has neglected or refused to provide substantive responses to the inquiries aforesaid, and he has neglected or refused to account for assets owned by or income earned by [Forward].
- [7] Similar allegations are made concerning Andes, as follows:
 14. [Andes] was incorporated in 1964 to hold and exploit copyright assets and royalties and it held the rights to publish and did publish at least ten songs by various authors: [list omitted]
 15. [Andes] had the rights to publish and did publish the foregoing songs and other songs from approximately 1964 until it alienated (by sale or assignment) those rights at some time unknown to the Plaintiff without the knowledge or consent of Tony Calder and without subsequently advising Tony Calder or accounting to him.
 16. At all material times, the Defendant, Peter Howard, was a Director and Secretary of [Andes], having a duty to conduct himself and the affairs of [Andes] in the best interests of [Andes] and its shareholders and the Defendant, Peter Howard had and continues to have, at all material times, a duty to account to the shareholders in [Andes] (and their successors and assignee) for the assets and income of that corporation.

17. The assets of [Andes], until alienated included the rights to publish the songs aforesaid which rights gave rise to a substantial stream of income derived in British Columbia and Canada as publishers and similar streams of income from other jurisdictions in which publishers' royalties arise by virtue of local legislation analogous to the Copyright Act in Canada.
18. On or about December 16, 2013, the Plaintiff demanded that the Defendant provide the following information [see list in para. 10 of the NCC quoted above]
19. In breach of the duties of a Director and the Secretary of [Andes], the Defendant, Peter Howard, has neglected or refused to provide substantive responses to the inquiries aforesaid, and he has neglected or refused to account for assets owned by or income earned by [Andes].
- [8] DropLo then alleges "respecting all claims":
 20. At all material times from incorporation in 1964 of [Forward] and [Andes] (hereinafter collectively "the Companies") through to their dissolution in 1983 and to the present day, the Defendant, Peter Howard was in charge of the legal and business affairs of the Companies.
 21. He maintained the register and records offices of the Companies, records of shareholdings, minutes of meetings, and periodic financial and other reports to government and members.
 22. He was directly involved in decisions to alienate assets of the Companies and to permit dissolution of the Companies.
 23. The Defendants jointly
 - a) failed to act in the best interests of each of the Companies by permitting alienation of corporate assets and income without consideration or compensation or, alternatively, without adequate consideration or compensation;
 - b) breached fiduciary duty owed to shareholders in the Companies, which shareholders were Sean Oldham and Tony Calder in Forward and Andes respectively, which shareholders have assigned their entitlements to the Plaintiff;
 - c) failed to account for income and assets as aforesaid
 - d) converted the income and assets aforesaid, including income and assets of the Companies
 - e) were unjustly enriched in respect of the assets and income aforesaid
 - f) misrepresented themselves as having authority to alienate the assets and income of the Companies, and to receive assets and income respectively, and
 - g) breached trust by alienating the assets and income aforesaid.
 24. Due to the acts and omissions of the Defendants, on or about December 12, 1983, the Companies . . . were dissolved and cannot be reinstated.

25. At all material times, all Defendants had easy access to Sean Oldham and Tony Calder and had a duty to preserve the Companies and the Companies' assets and income and all Defendants had an obligation to notify Sean Oldham and Tony Calder of circumstances giving rise to alienation of assets, income and the dissolution of the Companies but no Defendant warned either Sean Oldham or Tony Calder in breach of Defendants' duty to warn and fiduciary duty.
- [9] I boil down the facts alleged against Mr. Howard, as follows:
- (a) Forward and Andes were incorporated in 1964 to hold and exploit copyright assets and royalties and the rights to publish the songs described (NCC Part 1, paras. 6-7, 14-15);
 - (b) Forward and Andes held those assets and rights until they were "alienated" (NCC Part 1, paras. 7, 15);
 - (c) Mr. Howard was a director and officer of both Forward and Andes. As such, he had a duty to conduct himself and the companies' affairs in the best interest of the companies and its shareholders (NCC Part 1, paras. 8, 16);
 - (d) Mr. Howard (arising out of his alleged position as a director and officer) "had and continues to have" a duty to account to the shareholders of Forward and Andes for the assets and income of the companies (NCC Part 1, paras. 8, 16);
 - (e) until the assets of Forward and Andes were "alienated," they included the rights to publish the songs. These rights gave rise to "a substantial stream of income derived in" B.C. and Canada (NCC Part 1, paras. 9, 17);
 - (f) in December 2013, DropLo demanded "the Defendant" provide information concerning the songs (NCC Part 1, paras. 10, 18);
 - (g) in breach of his duties as a director and officer of Forward and Andes, Mr. Howard both refused to provide substantive responses to the information requests, and refused to account for assets owned or income earned by Forward and Andes (NCC Part 1, paras. 11, 19);
 - (h) from incorporation in 1964, through to dissolution in 1983 "and to the present day," Mr. Howard was in charge of the legal and business affairs of Forward and Andes (NCC Part 1, para. 20);
 - (i) Mr. Howard maintained the register and records office of Forward and Andes, records of shareholdings, minutes of meeting and periodic financial and other reports to government and members (NCC Part 1, para. 21);
 - (j) Mr. Howard was directly involved in decisions to alienate assets and to permit dissolution of Forward and Andes (NCC Part 1, para. 22);
 - (k) Mr. Howard, "jointly" with the other defendants: failed to act in the best interests of Forward and Andes by permitting alienation of corporate assets and income without consideration or compensation; breached fiduciary duties owed to shareholders; failed to account for

corporate assets and income that they permitted to be alienated; converted the corporate income and assets; were unjustly enriched "in respect of" the corporate assets and income; misrepresented themselves as having authority to alienate corporate assets and income, and to receive assets and income; and "breached trust" by alienating the corporate assets and income (NCC Part 1, para. 23);

- (l) on account of the acts and omissions of the defendants, Forward and Andes were dissolved in December 1983 and cannot be reinstated (NCC Part 1, para. 24); and
- (m) "the Defendants" had a duty to preserve Forward and Andes, as well as their assets and income. The Defendants had an obligation to notify Mr. Oldham and Mr. Calder of "circumstances" giving rise to the alienation of assets, income and of the dissolution of the companies. However, no one did, in breach of a duty to warn and a fiduciary duty (NCC Part 1, para. 25).

[10] In Part 2 of the NCC, DropLo seeks the following relief:

1. A declaration that Defendants breached their fiduciary duties and breached Trust in respect of the alienation of assets and income derived from Canada, being royalties paid to the Defendants or at their direction without authority,
2. A declaration that upon the dissolution of the Companies the assets and income devolve to the shareholders and, in appropriate cases such as this, to the shareholders' assignee in proportion to the shareholdings.
3. General damages for breach of fiduciary duty in respect of income derived from Canada.
4. General damages for breach of Trust in respect of income derived from Canada.
5. General damages in conversion in respect of income derived from Canada.
6. General damages for breach of a duty to warn.
7. General damages in quasi-contract for unjust enrichment in respect of income derived from Canada.
8. Special damages.
9. Aggravated damages.
10. Punitive damages.
11. An interlocutory and permanent injunction to restrain the Defendants from acting as agent or collecting monies appropriately due to the Plaintiff from Canada.
12. An accounting of all royalties received from Canada.
13. A Reference to the Registrar . . .
14. An Order of restitution respecting both assets and income;

15. Such further and other relief as to this honourable court may seem meet.
- [11] In Part 3, the "Legal Basis," DropLo pleads:
1. The Plaintiffs rely upon copyright law and Copyright Act, RSC 1985, c. C-42.
 2. The Plaintiff relies upon the common law of contract, trust, conversion, company law, fiduciary duty, and duty to warn.
 3. In the alternative, the Plaintiff relies upon the doctrine of quasi-contract or unjust enrichment or "money had and received."
 4. The Plaintiff relies upon equitable remedies of interlocutory and a permanent injunction and entitlement in trust law to a tracing remedy and an accounting.
- [12] Counsel for Mr. Howard described the pleading of the causes of action in the NCC as "convoluted." In my opinion, and with all due respect to the drafter, that is an apt description. Moreover, some of the allegations seem disconnected with familiar legal concepts, for example, the concept that corporate assets do not belong to the shareholders of the company.
- [13] One might question how Mr. Howard can be in charge, "to the present day," of the legal and business affairs of companies that were dissolved in 1983 (see NCC Part 1, para. 20). The only sensible reading of para. 22 of the NCC Part 1 (especially in the context of paras. 23 and 24) is that the assets (including publishing rights and royalties connected with the songs described) of Forward and Andes were alienated before the companies were dissolved. Although there is an allegation (NCC Part 1, para. 23(e)) that "the Defendants" were "unjustly enriched," there is no allegation of fact that Mr. Howard, personally, received anything. As a result, there are no facts pleaded concerning how this "enrichment" came about in Mr. Howard's case (as opposed to the unknown defendants, with whom he is lumped together). There are no facts pleaded to support a claim by Mr. Oldham or Mr. Calder that Mr. Howard held assets or property in trust for them. Rather, the only pleading is that Mr. Howard (again lumped together with "the Defendants") "breached trust by alienating the assets and income aforesaid" (NCC Part 1, para. 23(g)). There are no facts pleaded (other than that Mr. Howard was a director and officer of Forward and Andes) to support the "duty to warn" that he and the other defendants are alleged (in NCC Part 1, para. 25) to have breached.
- [14] How, on the facts alleged, DropLo (as the assignee of Mr. Oldham and Mr. Calder) has any legal right to royalties that may have been earned (either in B.C. or elsewhere) on the songs remains obscure.
- [15] The only pleading concerning payment of royalties to "the Defendants" is found in NCC Part 2, para. 1. But this paragraph is in the relief sought. There is no allegation of fact that any royalties were ever paid to Mr. Howard.

- [16] DropLo claims the right to serve the notice of civil claim on Mr. Howard outside B.C. on the grounds that the proceeding:
- (a) concerns restitutionary obligations that, to a substantial extent, arose in B.C., relying on s. 10(f) of the CJPTA;
 - (b) concerns a tort committed in B.C., relying on s. 10(g) of the CJPTA;
 - (c) concerns a business carried on in B.C., relying on s. 10(h) of the CJPTA; and
 - (d) is a claim for an injunction ordering a party to do or refrain from doing anything either (i) in B.C. or (ii) in relation to property in B.C. that is immovable or movable, relying on s. 10(i) of the CJPTA.

Determining "territorial competence" or jurisdiction

(a) Analytical Framework

- [17] Territorial competence - or jurisdiction - is to be determined exclusively by the substantive rules set out in the CJPTA: see *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592, at para. 12, and CJPTA s. 2. I will use the terms "territorial competence" and "jurisdiction" interchangeably.
- [18] The substantive rules for determining territorial competence are set out in CJPTA s. 3, which provides:
- 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.
- [19] The relevant provision in this case is s. 3(e).
- [20] Although the nature and extent of the connection necessary to effect a "real and substantial" connection is not spelled out in the CJPTA, s. 10 enacts a presumption that a real and substantial connection exists in certain specified circumstances, which are described in the subparagraphs of s. 10.
- [21] Section 10 provides in relevant part as follows:

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

...

- (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,
- (g) concerns a tort committed in British Columbia,
- (h) concerns a business carried on in British Columbia,
- (i) is a claim for an injunction ordering a party to do or refrain from doing anything
- (i) in British Columbia, or
- (ii) in relation to property in British Columbia that is immovable or movable property[.]

[22] In *Stanway*, K. Smith J.A. explained (at para. 22):

[22] The presumption of a real and substantial connection in s. 10 is a mandatory presumption with basic facts. The basic facts are those set out in s. 10(a) through (l), which are taken to be proven if they are pleaded. While the presumption is rebuttable, it is likely to be determinative in almost all cases.

[23] The objective is to determine whether there are facts alleged which, if true, would found jurisdiction. The court is not charged at this stage with determining whether the facts are true. Rather, a plaintiff need show only an arguable case that such facts - sometimes referred to as "jurisdictional facts" - can be established. Where jurisdictional facts are not pleaded, affidavit evidence can be considered to determine if the presumption of a real and substantial connection applies. If there is no arguable case (sometimes described as a *prima facie* case) on either the pleadings or the evidence that the facts, if true, would establish jurisdiction, the pleadings should be struck or the action dismissed or stayed. See: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85, at paras. 34 to 37; and *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, at para. 17, *aff'd* 2015 BCCA 265.

[24] DropLo, as assignee, cannot have any greater rights to sue Mr. Howard than its assignors, Sean Oldham and Tony Calder. DropLo concedes this. DropLo also concedes that (with some statutory exceptions) shareholders such as Mr. Oldham and Mr. Calder cannot claim in respect of a loss suffered by the company in which they hold shares, in view of the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (Ch.). This is one of the reasons why DropLo does not rely on s. 10(a) of the CJPTA ("the proceeding (a) is brought to enforce, assert, declare or determine proprietary or possessory rights . . . in property in British Columbia that is immovable or movable property").

- [25] The question, therefore, is whether the B.C. court would have jurisdiction over the claims asserted against Mr. Howard if they were made by Mr. Oldham and Mr. Calder. DropLo has the benefit of the presumptions of a real and substantial connection under s. 10 of the CJPTA, provided it makes out a *prima facie* case on the jurisdictional facts (either pleaded or in evidence).
- (b) Does the proceeding concern restitutionary obligations that, to a substantial extent, arose in B.C.?
- [26] DropLo says that the case falls squarely within CJPTA s. 10(f). It says that, in context, the relief claimed in para. 14 of Part 2 of the NCC - restitution of assets and income - are obviously the publishing rights and resulting royalties with respect to the songs. DropLo says that Mr. Howard's restitutionary obligation in respect of those assets and income was an obligation that, to a substantial extent, arose in B.C. It says that a substantial stream of income arises in B.C. from various forms of royalties resulting from sales, events and actions arising in B.C. DropLo says that s. 10(f) does not require that the claim be limited to obligations that arose in B.C. (unlike s. 10(d)(i)). Rather, it only requires that the obligations arose to a substantial extent in B.C.
- [27] Mr. Howard says that the claims in fact made by DropLo's assignees in the NCC do not relate to any royalty stream. Rather, it is alleged that Forward and Andes alienated their respective interests in assets and income (including the rights and income from the songs) for no or inadequate consideration, and that Mr. Howard, in his capacity as a director of Forward and Andes (and contrary to a duty alleged to be owed both to the companies and the shareholders), brought that about. Mr. Howard says that the potential damage does not relate to any royalty stream, but the allegedly improper transfer of the assets owned by Forward and Andes. Mr. Howard says that the fact of any royalty stream deriving from B.C. is irrelevant and immaterial to the quantification of any damages that might arise from the actual claims made.
- [28] Mr. Howard says that DropLo blurs the distinction between a claim for royalties and a claim for damages for breach of fiduciary duty or breach of trust. Neither of DropLo's assignors ever had any right to any royalties out of B.C. or elsewhere (and no such right is alleged), although Forward and Andes might, at one time, have had rights, which may have included royalty income from B.C. Mr. Howard says that DropLo's claims are, at most, claims by shareholders (Mr. Oldham and Mr. Calder) who, however, were never entitled to any royalties (which, based on the NCC, were corporate assets).
- [29] In my opinion, DropLo has failed show (either by pleading or evidence) facts constituting an arguable case that would establish jurisdiction over Mr. Howard on the basis that the claims against him concern restitutionary obligations that, to a substantial extent, arose in B.C. Mr. Howard is not alleged to have received any of the assets or income of either Forward or Andes that might possibly be the subject of a restitutionary claim. It is unclear that any facts have been pleaded to support the existence of any restitutionary obligation owed by Mr.

Howard to Mr. Oldham or Mr. Calder in respect of assets owned by Forward and Andes, much less the existence of a restitutionary obligation that, to a substantial extent, arose in B.C. The evidence filed does not assist to clarify the matter.

- [30] The result is that DropLo is not entitled to the benefit of the presumption under CJPTA s. 10(f) of a real and substantial connection with B.C. on the basis that the proceeding as against Mr. Howard concerns restitutionary obligations that, to a substantial extent, arose in B.C.
- (c) Does the proceeding concern a tort alleged to have been committed by Mr. Howard in B.C.?
- [31] DropLo says that it has provided prima facie proof of a tort committed by Mr. Howard in B.C. It says that there is documentary evidence (attached to Mr. Gary Procknow's affidavit No. 1) that ABKCO Music Inc., a company of which Mr. Howard is a vice-president and officer, is claiming and administering royalties flowing from the song "As Tears Go By." DropLo says that this song is intellectual property previously held by Forward and alienated without any accounting or notice. DropLo says that Mr. Howard is uniquely positioned, as a former director and officer of Forward and as a current officer of ABKCO Music Inc., "to explain and account for the alienation." DropLo says that Mr. Howard's failure to do so is "clearly alleged" to be conversion, which is a tort, committed in B.C.
- [32] Mr. Howard says that there can be no jurisdiction relying on s. 10(g) of the CJPTA. The NCC does not allege any damage suffered by either Mr. Oldham or Mr. Calder, and does not allege that either of them is, or ever has been, in B.C. Whatever wrongs are alleged relate to whatever duties attach to a director and officer of a U.K. company. Mr. Howard says that a tort cannot be committed in B.C. when neither the parties alleged to be victims nor the alleged tortfeasor are or were located in B.C., and when none of the relevant conduct (i.e., the "alienation" of the income and assets of Forward and Andes) took place here.
- [33] In my opinion, DropLo has failed to show facts that would constitute an arguable case, with respect to Mr. Howard, of a tort committed in B.C., and therefore it cannot rely on the presumption in CJPTA s. 10(g).
- [34] No complete cause of action in tort by Mr. Oldham and Mr. Calder has been pleaded against Mr. Howard. Neither Mr. Oldham nor Mr. Calder alleges that he has suffered any damage as a result of Mr. Howard's (alleged) wrongful conduct. This is hardly surprising, given that Mr. Oldham and Mr. Calder are shareholders, and that the complaints made in the NCC relate to Mr. Howard's conduct as a director and officer of Forward and Andes and his involvement in the "alienation" of rights, income and assets of those two companies. Although it is alleged in para. 23 of the NCC that "The Defendants jointly . . . d) converted the income and assets aforesaid," there is no allegation that Mr. Howard converted income or assets - or anything at all - to his own use.

[35] The evidence filed does not assist DropLo to support the existence of jurisdictional facts amounting to an arguable case against Mr. Howard personally of a tort committed in B.C. Assuming (without deciding) that Mr. Howard is a vice-president and officer of a company that is claiming and administering royalties flowing from the song "As Tears Go By," and that some of those royalties arise in B.C., those facts do not amount to a tort committed by Mr. Howard personally in B.C., in which the victims of the wrong are Mr. Oldham and Mr. Calder. At best, there might be some evidence that royalty income generated in B.C. is going to a company that employs Mr. Howard. However, that does not create an arguable case that Mr. Howard personally is receiving "a substantial stream of income" - or any income at all - "derived in British Columbia." No such case is pleaded against Mr. Howard personally, and the evidence filed does not support the prima facie existence of such a case against him.

(d) Does the proceeding concern a business carried on in B.C.?

[36] The fact that DropLo is a B.C. company is not, on its own, a sufficient connecting factor, nor does it establish territorial competence for purposes of s. 10(h) of the CJPTA: see *MicroCoal Inc. v. Livneh*, 2014 BCSC 787, at para. 87. There, Fleming J. wrote:

[87] In *Van Breda [Club Resorts Ltd. v. Van Breda]*, 2012 SCC 17 the court held the presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor (at para. 86). This court in *Thumbnail Creative Group Inc. v. Blu Concept Inc.*, 2009 BCSC 1833, rejected the plaintiffs' submission that territorial competence was established pursuant to s. 10(h) because the plaintiffs carried on business in BC. The defendants had argued their business, that was carried on in Massachusetts, was the subject matter of the action. The court agreed, holding (at para. 18):

A plaintiff cannot establish territorial competence by virtue of his or her own residence in British Columbia. Rather, the Court must examine whether the plaintiff's business in British Columbia is, in fact, the subject matter of the action.

[Citations omitted.]

[37] DropLo's business (whatever that might be) is clearly not the subject matter of this proceeding.

[38] However, DropLo says that this action nevertheless concerns a business carried on in B.C. DropLo says that the business of Forward and Andes was to own and exploit intellectual property, namely, publishing rights in songs worldwide. DropLo says that the action is about "the apparently mysterious alienation" of that property and business, and that the business is being carried on in B.C. to a significant extent.

- [39] DropLo relies on Purple Echo and Equustek Solutions to support its position that B.C. has jurisdiction over Mr. Howard on the basis that the proceeding concerns a business carried on in B.C. In both Purple Echo and Equustek Solutions, a challenge to jurisdiction was rejected, because the plaintiff had shown an arguable case that the proceeding concerned a business carried on in B.C.
- [40] Mr. Howard says that there is no reference in the NCC to a business being carried on in B.C., apart from the vague reference to "a substantial stream of income derived in British Columbia" (see NCC Part 1, paras. 9 and 17) with respect to publishing royalties, and there is no allegation that such royalties were ever actually received in B.C. Mr. Howard says that the "business" that is in fact the subject of the proceeding is not DropLo's current business, but the former businesses of Forward and Andes in the jurisdiction in which they were incorporated and operated (the U.K.).
- [41] Mr. Howard says that Purple Echo is distinguishable on the facts, since there was evidence to support a prima facie or arguable case that the defendant carried on business in B.C. (see Purple Echo, at paras. 47 and 54). Mr. Howard says that Equustek Solutions is also distinguishable, because there was a prima facie basis to conclude that the person challenging jurisdiction (Google Inc.) carried on business worldwide, including in B.C. Mr. Howard says that there is no allegation (and no evidence) that he personally carries on business in B.C., and the fact that he is sued along with "persons unknown" cannot mean there is an arguable case that the B.C. court has jurisdiction over him on the grounds that the proceeding "concerns a business carried on" in B.C.
- [42] I agree with Mr. Howard. In my opinion, DropLo has not put forward an arguable case that this proceeding concerns a business carried on in B.C.
- [43] I reject the proposition that the "business" for purposes of establishing jurisdiction over Mr. Howard can be a business carried on by the "persons unknown." If that proposition was taken to its logical conclusion, jurisdiction could be manufactured by the simple and expedient device of naming a "John Doe" or "Doe Corporation" defendant and asserting that that person carries on business in B.C. Wisely, Mr. Sutherland did not press this point in oral submissions.
- [44] It is important to remember that the dispute is between Mr. Howard personally, and Mr. Oldham and Mr. Calder (who are the real complainants). Their only relationship arose out of the fact that Mr. Oldham and Mr. Calder were shareholders in Forward and Andes (respectively). Mr. Oldham and Mr. Calder complain about how Mr. Howard, in his capacity as a director and officer, managed those companies, and they complain in particular that he caused the companies to "alienate" assets and income. The action is about Forward's and Andes' businesses, what happened to the corporate assets (including song royalties) that belonged to those companies before they were dissolved in 1983, and Mr. Howard's involvement in the disposition of those assets while he was a director and officer. DropLo has not put forward a prima facie case that any of this concerns a business carried on in B.C.

[45] I also agree with Mr. Howard that Purple Echo and Equustek Solutions are distinguishable. In both cases, there was evidence before the court that supported an arguable case that the person challenging jurisdiction was in fact carrying on business in B.C. Here, there is no such evidence in respect of Mr. Howard personally. That he might be employed by a corporation who might carry on some business in B.C. is, in my view, insufficient.

(e) Does the proceeding claim an injunction ordering a party to do or refrain from doing anything in B.C. or in relation to property in B.C. that is immovable or movable property?

[46] DropLo claims an injunction in the following terms (NCC Part 2, para. 11):

An interlocutory and permanent injunction to restrain the Defendants from acting as agent or collecting monies appropriately due to the Plaintiff from Canada.

[47] DropLo says that it is seeking an order that the Defendants be restrained from holding themselves out as eligible to collect song royalties emanating from B.C., and that such relief falls within CJPTA s. 10(i)(i). DropLo says further that such activity on the Defendants' part is "in relation to property" in B.C. that is movable property, namely, intellectual property governing and obliging royalties to be paid from B.C. Therefore, there is also jurisdiction relying on s. 10(i)(ii).

[48] However, there is no allegation that Mr. Howard is personally receiving royalties - or doing anything at all - in B.C. Moreover, the evidence submitted does not support an arguable case that he is personally receiving royalties or doing anything in relation to movable property in B.C. Section 10(i) is personal to the person sought to be enjoined.

[49] Accordingly, in my opinion, DropLo cannot rely on s. 10(i) to establish a B.C. court's jurisdiction over Mr. Howard.

(f) Has DropLo proved other circumstances that constitute a real and substantial connection between B.C. and the facts on which the proceeding is based?

[50] In DropLo's application response, it argued in the alternative that, if none of the presumptions in subparagraphs (a) through (l) of s. 10 of the CJPTA was applicable, then there was nevertheless a real and substantial connection between B.C. and the facts of this case.

[51] This argument was not developed in oral submissions, or in the further written submissions, so I will address it only briefly.

[52] DropLo says that the facts reveal that Mr. Howard has spent his career in the business of exploiting intellectual property in songs worldwide, and that the relevant intellectual property rights of Forward and Andes are worldwide rights. Accordingly, DropLo "invites the Court to presume substantial income and value emanate from British Columbia." DropLo says that such a presumption is particularly appropriate where Mr. Howard does not deny his directorship, shareholding or role as secretary of Forward and Andes, and "clearly speaks on behalf of the current rights holder ABKCO Music Inc. when refusing the accounting

[which] prompted the lawsuit."

- [53] In response, Mr. Howard says that DropLo's suggestion that the court should find jurisdiction because some of the entities may have had worldwide intellectual property rights is not deserving of serious consideration, and should be disregarded.
- [54] Whether a plaintiff has proved "other circumstances" that constitute a real and substantial connection is not necessarily a simple matter: see, for example, the discussion in *Aleong v. Aleong*, 2013 BCSC 1428, at paras. 101 and following. What DropLo is proposing would be a new presumptive connecting factor. However, its argument, the nature of its proposed connecting factor, and how that meets the requirement of a "real and substantial connection," are largely unarticulated.
- [55] In that light, I reject DropLo's argument that jurisdiction can be established on the basis that DropLo has proved other circumstances that constitute a real and substantial connection with B.C.
- (g) Summary on Jurisdiction
- [56] In summary, I find that DropLo has failed to show facts constituting a *prima facie* or arguable case that would establish jurisdiction of the B.C. court over Mr. Howard in this action.

Forum conveniens

- [57] Since I have determined that B.C. has no jurisdiction over Mr. Howard, it is unnecessary for me to address the arguments concerning whether a court of another state (the U.K.) is a more appropriate forum in which to hear the proceedings. I will therefore deal only briefly with whether jurisdiction should be declined on the grounds that there is a more appropriate forum.
- [58] Section 11 of the CJPTA is a complete codification of the common law test for forum conveniens. It provides:

Discretion as to the exercise of territorial competence

- 11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
- (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.

[59] The law on s. 11 was recently summarized by Maisonville J. in *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715, at paras. 63-67, *aff'd* 2015 BCCA 200.

[60] The burden is on Mr. Howard to show that the other forum (the U.K.) is clearly more appropriate: see *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, at paras. 103, 108-109.

[61] Mr. Howard says that, applying the factors in s. 11(2), the U.K. is clearly the more appropriate forum. He says that he will be the principal witness, and the expense of travelling from the U.K. to B.C., where there is only a tenuous connection, militates against this court exercising jurisdiction. He says the other witnesses (Mr. Calder, for example) are also located in the U.K. DropLo representatives will be the least important, as they have no first-hand knowledge of material events (given that DropLo was not incorporated until November 2013). Mr. Howard says further that the applicable law (concerning corporate organization and governance, and the law of fiduciaries) will be the law of the U.K., and copyright law of other jurisdictions with respect to song royalties outside of Canada. Mr. Howard denies that Mr. Oldham or Mr. Calder have any claims against him. However, he says that if any causes of action exist, they and any loss or damage (which Mr. Howard also denies) arose outside B.C. This is another reason for the court to decline jurisdiction, in favour of the U.K.

[62] DropLo says that B.C. is a perfectly adequate forum. It says that the outcome of the case will likely turn on documentary evidence, and the relevant documents are likely in the New York City area. Other steps (for example, use of video for examinations for discovery) are available to minimize the necessity and cost of travel.

[63] In my opinion, having regard to the factors in CJPTA s. 11(2) and the law discussed in *JTG Management*, the U.K. is clearly a more appropriate forum than B.C. The connections with B.C. are slim. DropLo is located here. However, the real parties to the dispute, to the extent that DropLo has been prepared or able to identify them, are in the U.K. There is little justification to require those individuals to travel thousands of kilometres (with the associated expense) to litigate issues that can be litigated between them in their home jurisdiction. The two companies whose assets are in issue (*Forward* and *Andes*) were U.K. companies, and I agree with Mr. Howard that the applicable law is very likely going to be U.K. law. DropLo says that the case will likely turn on documentary evidence. Assuming that is true, the documents are not located in B.C.

[64] Accordingly, had I concluded that B.C. had jurisdiction over Mr. Howard, I would nevertheless have stayed the proceeding as against him on the grounds that the U.K. is a more appropriate forum.

Summary and disposition

[65] In summary, I conclude that the B.C. court does not have jurisdiction over Mr. Howard in respect of the claims in this proceeding.

[66] Mr. Howard sought to have the whole of the action dismissed in those circumstances. On the other hand, DropLo argued that the court should stay or strike the claim against Mr. Howard only, leaving the remaining claims against the Doe individuals and Doe corporations.

[67] I have some concerns about the utility of leaving DropLo's action to stand with only "persons unknown" as defendants. However, I will accept at face value Mr. Sutherland's request to make such an order.

[68] The action is, accordingly, dismissed as against Mr. Howard.

[69] If the parties are unable to agree on costs, they may make submissions on costs providing they take the necessary steps, within 30 days of this judgment, to schedule a hearing date convenient to counsel and the court.

"Adair J."

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