

CANADA / JUDGMENT

Laxton v. Anstalt

2010 BCSC 1002

COURT

Supreme Court of British Columbia

DECIDED

16 July 2010

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2010 BCSC 1002 Laxton v. Anstalt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Laxton v. Jurem Anstalt,

2010 BCSC 1002

Date: 20100716

Docket: S096767

Registry: Vancouver

Between:

Chandra Laxton

Plaintiff

And

Jurem Anstalt and Juricon Treuhand Anstalt

Defendants

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

(In Chambers)

Corrected Judgment: The text of the judgment was corrected in the citation and header on July 30, 2010

Counsel for the Plaintiff:

John R. Shewfelt

Counsel for the Defendants:

Robert W. Cooper

Place and Date of Hearing:

Vancouver, B.C.

May 21 and June 18, 2010

Place and Date of Judgment:

Vancouver, B.C.

July 16, 2010

- [1] This action concerns the transfer by wire of \$2,561,409.00 of funds impressed with a trust for the benefit of the plaintiff, from an HSBC bank account in North Vancouver, British Columbia to the account of the defendant Jurem Anstalt ("Jurem") at LGT Bank in Lichtenstein. The latter is managed by the defendant Juricon Treuhand Anstalt ("Juricon"), a Lichtenstein company.
- [2] At the time of the transfer, allegedly with the knowledge of the defendants, the funds were impressed by a remedial constructive trust for the benefit of the plaintiff after matrimonial proceedings. A transfer was made by the principal officer of 629256 B.C. Ltd., Robert Knight, allegedly. According to facts found at the previous trial before Mr. Justice Kelleher, reasons indexed at 2008 BCSC 42, supplementary reasons at 2008 BCSC 955, Mr. Knight acted on instructions from Juricon, and Jurem is the express or constructive trustee of Deltec Worldwide Limited, the original source of the funds, and an entity found by Kelleher J. to be used for the purpose of holding and concealing assets belonging to the plaintiff.
- [3] The defendants deny receiving such funds subject to any such trust, and they deny in any event that this Court has territorial competence to establish jurisdiction over the matter.

THE APPLICATION

- [4] The defendants bring this application for an interim order staying the action pending determination as to whether this court has jurisdiction over the defendants or, alternatively, whether the Court should decline to accept jurisdiction.
- [5] The application is brought pursuant to Rules 14(6) and 14(6.1) of the Rules of Court, B.C. Reg. 221/90 and further pursuant to ss. 3, 10 and 11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA].

TERRITORIAL COMPETENCE

- [6] Rule 14(6) provides:

14 (6) A party who has been served with an originating process in a proceeding, whether served with the originating process in that proceeding in or outside of British Columbia, may, after entering an appearance,

- (a) apply to strike out a pleading or to dismiss or stay the proceeding on the ground that the originating process or other pleading does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
- (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or
- (c) allege in a pleading that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

[7] Rule 14(6.1) provides:

14(6.1) Whether or not a party referred to in subrule (6) makes an application or allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.

[8] The applicable provisions of the CJPTA are ss. 3 and 10:

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

...

- (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

...

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

[9] In *Purple Echo Productions Inc. v. KCTS Television*, 2008 BCCA 85, Chiasson J.A. set out the process to be followed and the applicable standards under the Rule 14(6) scheme:

- [33] Rule 14(6)(a) involves an analysis to determine "facts that, if true, would establish that the court has jurisdiction". On the plain language of the section, proof of those facts on a balance of probabilities is not required.
- [34] In my view, consonant with the comments of Smith J.A. in Roth [Roth v. Interlock Services, Inc., 2004 BCCA 407, 33 B.C.L.R. (4th) 60] and those of Mackenzie J.A. in Furlan v. Shell Oil Co., 2000 BCCA 404, 77 B.C.L.R. (3d) 35, referred to in MTU Maintenance Canada Ltd. v. Kuehne & Nagel International Ltd., 2007 BCCA 552, [2007] B.C.J. No. 2433 (QL), where jurisdictional facts are not pleaded, affidavit evidence can be adduced to meet the requirement of the Rule. It would be a startling departure from existing jurisprudence if the consideration of jurisdiction were confined solely to the pleadings with no opportunity for a plaintiff to support jurisdiction with evidence. It also is my view that the nature of the inquiry does not change merely because evidence is adduced. The objective is to determine whether there are facts alleged, which if true, would found jurisdiction. The court is not charged with the task of determining whether the facts are true. A plaintiff need show only an arguable case that they can be established.
- [35] Rule 14(6)(b) entitles a defendant to challenge jurisdiction even if a plaintiff were able to meet the requirements of Rule 14(6)(a). In substance, that is how this case proceeded. That is, Purple Echo introduced evidence to support the existence of jurisdictional facts, which was challenged by KCTS. In my view, the second part of Smith J.A.'s comments in Roth was engaged: the contention that evidence introduced to show the plaintiff's claim to jurisdiction is tenuous requires the plaintiff to "show a good arguable case".
- [36] As a matter of principle, if there were no arguable case on either the pleadings or evidence that the facts, if true, would establish jurisdiction, the pleadings would be struck or the action dismissed or stayed.
- [37] If an arguable case were made out, the case would continue with jurisdiction potentially still a live issue. Insofar as jurisdiction remains a contested issue, a plaintiff that merely has established facts that if true would support jurisdiction, continues with the obligation to prove those facts (see: MTU Maintenance Canada Ltd. at para. 35). This brings into play Rule 14(6.4).
- [38] Rule 14(6.4) deals with attornment. A defendant does not attorn merely by bringing an application under Rule 14(6)(a) or (b) or by pleading lack of jurisdiction under Rule 14(6)(c), but this period of immunity lasts only until the court has decided the application or the issue raised in the pleading (Rule 14(6.4)(b)). In my view, if a defendant were to apply under Rule 14(6)(a) or (b) and lose and had or does not plead a lack of jurisdiction under Rule 14(6)(c), jurisdiction no longer would be a live issue and participation in the action would constitute attornment. Subparagraphs (a) - (c) of Rule 14(6) are separated by the disjunctive, but inclusive, "or" and the protection from attornment is worded similarly. The inclusive "or" expresses the idea of "and/or". (Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Vancouver: Butterworths) at 66-68). This interpretation is reinforced by the

wording of Rule 14(6.4)(a), which provides that a party does not attorn by filing "any or all" of the applications or pleadings referred to in Rule 14(6). In my view, Rule 14(6)(c) allows a defendant to keep jurisdiction live even if an application under Rule 14(6)(a) or (b) were unsuccessful.

- [39] This supports the conclusion that a determination under Rule 14(6)(a) or (b) in favour of a plaintiff is not a final determination of the issue and does not require proof on the balance of probabilities.
- [10] In this case, evidence was introduced in the form of affidavits from both the plaintiff and the defendant. At this stage the plaintiff, according to Purple Echo, need only show that there is a "good arguable case" in its favour. Since a real and substantial connection can be established presumptively by showing that either s. 10(f) or s. 10(g) of the CJPTA is satisfied, even if the defendants were to raise evidence rebutting that presumption, as long as the plaintiff still remains with a "good arguable case" after a consideration of all the evidence, the application should be dismissed.
- [11] The factors to consider in determining whether the presumptions set out in the CJPTA are rebutted are set out in the common law. At common law, whether there is a real and substantial connection between the proceeding and the jurisdiction is determined using the eight factors outlined by the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) [Muscutt]:
- (i) The connection between the forum and the plaintiffs claim;
 - (ii) The connection between the forum and the defendant;
 - (iii) Unfairness to the defendant in assuming jurisdiction;
 - (iv) Unfairness to the plaintiff in not assuming jurisdiction;
 - (v) Involvement of other parties to the suit;
 - (vi) The court's willingness to recognize and enforce extra-provincial judgment rendered on the same jurisdictional basis;
 - (vii) Whether the case is interprovincial or international in nature; and
 - (viii) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.
- [12] Recently, the Ontario Court of Appeal in *Van Breda v. Village Resorts Limited*, 2010 ONCA 84, leave to appeal to S.C.C. granted, 33692 (July 8, 2010) at paras. 83 - 101, enumerated the Muscutt factors in a simplified version with six factors, merging the first two Muscutt factors into a consideration of the connection between the forum, the plaintiff's claim and the defendant; and merging the third and fourth Muscutt factors into a consideration of fairness.

- [13] In *Van Breda*, Sharpe, J.A. commented that the core of the real and substantial connection analysis rests upon the connection between the plaintiff's claim and the forum and the defendant and the forum, and that the other factors should be treated as general legal principles, or analytic tools that bear upon the analysis, rather than as independent factors having more or less equal weight. (*Van Breda* at paras. 84 and 109.)
- [14] The defendants submit that while the Courts have described the real and substantial connection test as "flexible", there is still a requirement for courts to prevent overreaching. The flexibility of the test does not equate to reaching to find a real and substantial connection where none exists. The test requires a "significant or substantial connection." See *Josephson v. Balfour Recreation Commission*, 2010 BCSC 603 at paras. 77 and 79.

TORT COMMITTED IN BRITISH COLUMBIA

- [15] The plaintiff pleads three torts. The first is theft and conversion based on the transfer and fraudulent conversion of the trust funds from the legal owner and trustee of the funds, Deltec Worldwide Limited, and the plaintiff as beneficiary.
- [16] The plaintiff pleads alternatively that Juricon and Jurem knowingly assisted Mr. Knight causing the funds to be transferred. The plaintiff also sues the defendant Jurem for knowingly receiving the trust funds for its own use and benefit in circumstances in which it had, at a minimum, knowledge of facts sufficient to put a reasonable person on notice of inquiry that the transfer was a dishonest, illegal act and breach of trust, and it failed to inquire to ascertain whether the transfer was a misapplication of trust property.

Conversion

- [17] The tort of conversion occurs with the act of taking property or of interference with the property rights of the plaintiff. Every conversion of money occurs at the place where the money is taken from, not the place where it is taken to.

Knowing Assistance and Knowing Receipt

- [18] The elements of knowing assistance and knowing receipt were reviewed in *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, wherein the majority adopted the analytical approach of Iacobucci J., dissenting in the result. Concerning liability for knowing assistance, Iacobucci J. held at para. 34 as follows:

In the present case, in order to recover damages for knowing assistance, the appellant must demonstrate the following:

- (1) That there was a trust;
- (2) That the named trustee, Rosenberg, perpetrated a dishonest and fraudulent breach of trust; and

- (3) That the respondent Bank participated in and had actual knowledge of Rosenberg's dishonest and fraudulent breach of trust.

[19] In respect of the elements of knowing receipt, Iacobucci J. wrote at para. 53:

... in order to recover the disputed property, the plaintiff must prove the following:

- (1) That the property was subject to a trust in favour of the plaintiff;
- (2) That the property, which the defendant received, was taken from the plaintiff in breach of trust; and
- (3) That the defendant did not take the property as a bona fide purchaser for value without notice. The defendant will be taken to have notice if the circumstances were such as to put a reasonable person on inquiry, and the defendant made none, or if the defendant was put off by an answer which would not have satisfied a reasonable person.

[20] The plaintiff submitted that the elements of knowing assistance are very similar to those of conspiracy. This is because in most circumstances, the same facts could give rise to liability for either knowing assistance or conspiracy to commit a breach of a trust obligation. Therefore, the plaintiff submits that the principles governing territorial competence over actions for knowing assistance and knowing receipt should be consistent with the principles applicable in actions involving tortious conspiracy.

[21] With respect to the territorial competence of the court in cases of tortious conspiracy, it was held in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263 the Court held at para. 43 that "[a] conspiracy occurs in British Columbia if the harm is suffered here, regardless of where the 'wrongful conduct' occurred."

[22] The plaintiff alleges that Hans Mechnig was the operating mind of Benures, one of the parties in the previous litigation of this case. The knowledge of the trust was gained through participation of the defendants' operating mind, Mr. Mechnig, in the previous litigation. Mr. Mechnig must be taken to have known that the pleading in the previous litigation in which he participated established a constructive trust in favour of the plaintiff. It is inconceivable that Mr. Mechnig would not have known of the funds and the trust in favour of the plaintiff. Thus the defendants acquired the required knowledge to establish a real and substantial connection in British Columbia.

[23] The most important factor in the case at bar is that the Statement of Claim pleads that the trust funds were wired to Jurem on instructions from the defendant Juricon. That the pleading is supported by the evidence of Mr. Knight who swears that he made the wire transfer accordingly, knowing from the previous litigation that Jurem Anstalt was a "nominee account for a trust company in Vaduz, Liechtenstein, called Juricon Trust".

- [24] The plaintiff submits that the law deems the instruction alleged by Mr. Knight to have occurred at the location where it was received, that is, in British Columbia. The plaintiff refers to *Canadian Commercial Bank v. Carpenter* (1989), 39 B.C.L.R. (2d) 312 (C.A.) where the Court considered cross-jurisdiction and communications in the context of a misrepresentation. The Court held as follows at 319:

Applying the reasoning of Aikins J. to the case before us, it seems clear that the tort of misrepresentation or negligent advice, which is what is complained of here, is only committed and complete when, and where, the misrepresentation or negligent advice is received. It is true that Mah Toy was in Calgary when he gave the advice complained of, but that advice was received by and on behalf of the appellants in this jurisdiction. Clearly, by this standard, the tort was committed in British Columbia.

- [25] There is also the involvement of an individual named Hans Mechnig, the operating mind of one or more of the companies involved with the defendants, who is alleged by the plaintiff to have had personal knowledge of the facts both in regard to this action and also in regard to the previous action. The plaintiff also points to the evidence and admissions of Mr. Knight, the person on behalf of 629526 B.C. Ltd. who made the wire transfer, and who testified at trial in the previous litigation and he believed Jurem Anstalt to be the nominee account for a trust company in Liechtenstein called Juricon Trust. When asked whether he had a clear recollection of the wiring instructions that he received, he testified:

"I don't have a clear recollection on that but most likely they came from Juricon Trust."

Argument of Defendants

- [26] The defendants say that there is no real and substantial connection between British Columbia and Juricon. They say that the instruction to transfer the funds to Liechtenstein was given in Liechtenstein and that all decisions made with respect to the funds in question in this transaction were made in Liechtenstein insofar as the defendants are concerned. If a tort was committed at all, they say, it was committed in Liechtenstein.
- [27] The defendant submits that the act of the defendants in instructing Mr. Knight to transfer the funds electronically from British Columbia to Liechtenstein, is insufficient to establish a tort committed in British Columbia.
- [28] The defendants submit that where the defendant, as here, confined its activities to its home jurisdiction, and has not taken any action within a foreign jurisdiction, it will not normally be subject to the jurisdiction of the foreign forum. They cite *Van Breda*, supra at para. 89; *Coast Spas Inc. v. California Acrylic Industries, Inc.*, [1997] B.C.J. No. 1718 (S.C.) at para. 25; *Pan-Afric Holdings Ltd. v. Ernst & Young LLP*, 2007 BCSC 685 at para. 36; and *Lazer-Tech Ltd v. Dejeray*, 2010 ONSC 1662 at paras. 31 and 32 in support of this proposition.

- [29] The defendants submit that the defendants have no connection with British Columbia and that therefore any transaction with the defendants could only have occurred in Liechtenstein according to the laws of Liechtenstein.
- [30] The defendants do not go so far as to suggest there was any prohibition against Jurem and Juricon conducting business outside of Liechtenstein, and in particular, in British Columbia.

Conclusion on s. 10(g)

- [31] The allegation that Juricon ordered the funds from Mr. Knight is not being seriously challenged. The challenge from the defendants is that such a brief act, does not constitute a real and substantial connection. In my view, the pleading plus the evidence to the effect that the communication that initiated the loan came and was received in Canada, establishes a good arguable case to the effect that there was a substantial connection with this jurisdiction.
- [32] The defendants submit that the claim cannot be in tort for the plaintiff because acts complained of, as pleaded, are founded in trust law, and there is no independent claim available in tort in the circumstances.
- [33] This argument, neglects the nature of the remedial constructive trust. The plaintiff's rights in trust are not established on an additional basis of an agreement between trustee and beneficiary. Trust rights on a remedial trust are just that, a remedy and no more. There is no reason that I can see to deny the right of the plaintiff, who has an interest in those funds to take action either against the defendants in tort or for breach of trust on the basis that Jurem knowingly received trust funds for its own use in which it had, at a minimum, knowledge of facts sufficient to put a reasonable person on notice or inquiry that a transfer was a dishonest breach of trust and it failed to inquire into whether the transfer was a misappropriation of trust property. The defendant Jurem was unjustly enriched by the receipt of the trust fund at the expense of the plaintiff and without any juristic reason for the enrichment.
- [34] Whether knowing assistance or knowing receipt are founded in tort or breach of trust is immaterial for the purposes of the CJPTA. Even if they are only applicable in the context of breach of trust, since breach of trust is a principle of equity,
- [35] The tort of conversion is complete with the act of taking property or interfering with the property rights of the owner. The point at which conversion or other wrongful taking of property or money occurs is at the place at which the money is taken, not the place to which it is taken. It was taken in the case at bar from this Province, and accordingly, this Court clearly has the territorial competence over this claim because it took place in British Columbia.

RESTITUTIONARY OBLIGATIONS ARISING IN BRITISH COLUMBIA

- [36] The plaintiff argues that jurisdiction is presumed under section 10(f) of the CJPTA because the action is concerned with "restitutionary obligations that, to a substantial extent, arose in British Columbia", and that the remedy for the conversion of, or for the "knowing receipt" of, trust property is restitutionary in nature: *Alers-Hankey v. Solomon*, 2002 BCCA 227 at paras. 19-20.
- [37] The plaintiffs argue that the restitutionary obligations in this case arose in British Columbia in two respects:
- a) They concern the enforcement of this British Columbia Court's trust declaration that arose in the previous litigation.
 - b) They concern the restitutionary obligations of Jurem as knowing recipient of trust property. These obligations arose substantially from the fact that the trust funds were wrongfully removed from British Columbia.
- [38] For substantially similar reasons as argued under s. 10(g), the defendants argue that there is no presumption of a real and substantial connection under s. 10(f) of the CJPTA on the facts alleged because any restitutionary obligations owed by the defendants to the plaintiff could only have arisen in Liechtenstein from actions taken by the defendants there.
- [39] I am in agreement with the submissions of the plaintiffs. They have made out a case for the potential for restitutionary obligations that substantially arose in British Columbia to be awarded to them. There would thus be, under s. 10(f) of the CJPTA, a presumption of a real and substantial connection.

CONCLUSION: PRESUMPTION OF REAL AND SUBSTANTIAL CONNECTION

- [40] In my view, taking into account the pleadings and affidavit evidence filed by both the plaintiff and defendants in this matter, the plaintiff has made out a "good arguable case" under both ss. 10(f) and 10(g) of the CJPTA, and thus a presumption exists that there is a real and substantial connection between the matter and this forum. It thus becomes open to the defendants to rebut that presumption, and they submit that a consideration of the *Muscutt* factors must lead this court to do so.

CONSIDERATION OF THE MUSCUTT FACTORS

- [41] The plaintiff argues that the jurisdictional analysis is limited to the factors in s. 10 of the CJPTA and that the common law factors in *Muscutt* no longer apply, citing *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592, 314 D.L.R. (4th) 618, leave to appeal ref'd [2010] S.C.C.A. No. 68 at para. 73:

In my view, any reliance on the *Muscutt* factors as a guide to determining the question of jurisdiction came to an end in British Columbia with the coming into force of the CJPTA.

[42] The defendants respond that the holding of Loo J. in Josephson, supra at para. 55 leaves the door open to a consideration of the Muscutt factors in the context of this case. She wrote:

... In my view, the comments of K. Smith J.A. at para. 73 of Stanway were confined to the circumstances of a presumed real and substantial connection, in which case it is not necessary to apply the Muscutt test. Where the presumption does not apply, however, it is open to the plaintiff or third party to prove that other circumstances constitute a real and substantial connection between British Columbia and the facts on which the proceeding is based. The party can only do so by resorting to the common law test for guidance on what is necessary to establish jurisdiction simpliciter. [Emphasis in original]

[43] In this case, however, I have found that the requirements under ss. 10(f) and 10(g) have been met and that there is therefore a presumed real and substantial connection. Thus, an approach consistent with the comments of Loo J. would mean that, in accordance with the holding of K. Smith J.A. in Stanway, the Muscutt factors are not to be applied.

[44] The defendants nevertheless state that the recent judgment of a special panel of five judges of the Ontario Court of Appeal in Van Breda, supra should be applied in considering the interplay between the CJPTA and the Muscutt factors. At para. 65, the Court held:

... Nor is real and substantial connection made out conclusively if the case falls into one of the categories listed; s. 10 merely provides a real and substantial connection is only "presumed to exist" and, as explained by the Drafters' Comments, "[a] defendant will still have the right to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial".

[45] In my view, the comments of the Ontario Court of Appeal do not go so far as to state that the Muscutt factors are to be applied in determining whether the defendants have rebutted the presumptions set out in the CJPTA. Until the Supreme Court of Canada conclusively sets out one way or the other the approach to be taken in that regard, in my view, the application of the Muscutt factors in such a manner would go against the jurisprudence set out by our Court of Appeal in Stanway and this Court in Josephson.

[46] Going further, the application of the Muscutt factors in determining whether a presumption under s. 10 of the CJPTA was rebutted, would in my view essentially mark a return to the much-criticized Muscutt analysis which the enactment of the CJPTA was intended to displace. It would in essence mean that the Muscutt test remained very much in force, and only the presumptions and burden of proof with respect to the real and substantial connection test had been reversed by the enactment of the CJPTA. As pointed out by our Court of Appeal in Stanway at para. 71, most of the Muscutt factors go beyond the "real and substantial connection" standard and into what is in essence a forum non conveniens analysis.

- [47] In my view, there is a sufficient body of evidence and pleaded facts that establish that the operating mind of the defendants, Mr. Mechnig, was an operating mind of one of the defendants in the previous action and in so being, had constructive or actual knowledge of the trust sufficient to establish knowing receipt, knowing assistance, or possibly conversion, and that these were torts committed in British Columbia or were breaches of trust which gave rise to restitutional obligations in British Columbia. The evidence and arguments of the defendants are not enough to rebut the presumptions under the CJPTA.
- [48] Even if I am wrong about the inapplicability of the Muscutt test to the rebuttal of the presumptions set out in s. 10 of the CJPTA, weighing and accounting for those factors, the fact of a common operating mind in Mr. Mechnig is strong enough to bring the defendant Liechtenstein companies into the jurisdictional sphere of this Court. The defendants, in their arguments under each factor, rely heavily on the fact that the defendants are Liechtenstein companies that are incorporated in that country and appear to solely do business there. In my weighing of the rest of the factors, upon which the defendants rely heavily, as well as this fact; the common operating mind connection overpowers these factors, in much the same way that the pleading that the foreign defendants were joint tortfeasors with their Canadian subsidiaries overpowered the other factors in Stanway.
- [49] Thus, in any event, I find that there is a real and substantial connection between this action and British Columbia, bringing the defendants within the jurisdiction of this court.

FORUM NON CONVENIENS ARGUMENT

- [50] Section 11 of the CJPTA codifies and replaces the common law test performed for the forum non conveniens analysis. See *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11. The section reads as follows:

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.
- [51] Applying the principles, the approach of the Court must be to require a clear demonstration that a foreign Court is more appropriate. *Amchen Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 is a case that, although preceding the current CJPTA, is applicable. Sopinka J. held at para. 53 that "where there is no one forum that is the most appropriate, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum."
- [52] On the practicalities of the matter, it is to be observed there is but one necessary witness for the defendants in Liechtenstein, to wit, Mr. Mechnig. He deposes that "other directors, officers or employees of the defendants have little or no involvement to the matters at issue in this case "
- [53] In the previous litigation, Mr. Mechnig gave viva voce evidence by video teleconference, a means by which a defendant's participation could be managed conveniently, inexpensively, and without any language problems.
- [54] At the same time, at least two key witnesses reside in British Columbia: Ms. Laxton and Mr. Knight. The only other material witness, Mr. Speckert, resides in Switzerland. The evidence does not show that it would be comparatively more convenient, and less expensive to litigate in Liechtenstein.
- [55] Foreign law must be pleaded, and the defendants' Statement of Defence makes no mention of and, pleads no reliance upon, Liechtenstein law. See *Winbigler v. Winbigler* (1953), 10 W.W.R. (N.S.) 131 (B.C.S.C.)
- [56] Mr. Cooper on behalf of the defendants argues that if the British Columbia Courts assumes jurisdiction in this proceeding, and eventually the judgment is granted in favour of the plaintiff, the Liechtenstein Courts would not recognize or enforce it. Accordingly, he cautions the Court that broad-based application of the real and substantial connection test which is inconsistent with the law of foreign jurisdiction may not be enforceable. He argues that if positions were reversed, a British Columbia Court would not recognize a Liechtenstein Court judgment.
- [57] In my view, this Court must administer the law unintimidated by the fear that a party will refuse to obey its orders. There is no evidence before me to suggest in the first place, that a proper order of this Court will be disregarded in Liechtenstein, and that is gratifying. If that is incorrect, however, it will not change the fact that this order is in force and the plaintiff may make such available steps as are proper and necessary to enforce it.
- [58] Taking into account the factors set out in s. 11 of the CJPTA, I find that this Court is not *forum non conveniens*.

CONCLUSION

[59] The application of the defendants for an interim order staying this action under Rules 14(6) and 14(6.1) is dismissed with costs.

"The Honourable Mr. Justice Rice"

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