

CANADA / JUDGMENT

Rotor Maxx Support Limited v. Air Palace Co., Ltd.

2020 BCSC 1321

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1321 Rotor Maxx Support Limited v. Air Palace Co. Ltd.

SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rotor Maxx Support Limited v. Air Palace Co. Ltd.,

2020 BCSC 1321

Date: 20200908

Docket: S183230

Registry: Vancouver

Between:

Rotor Maxx Support Limited

Plaintiff

And

Air Palace Co., Ltd.

Defendant

Before: The Honourable Madam Justice C. Ross

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

S. Taylor

Counsel for the Defendant:

S. Bae

Place and Date of Hearing:

Vancouver, B.C.

July 7 and July 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 8, 2020

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Introduction

- [1] In the present litigation, the plaintiff Rotor Maxx Support Limited ("RMS") claims that it entered into contracts with the defendant Air Palace Co. Ltd. ("AP") to repair a helicopter engine and to rent AP a replacement engine. RMS alleges that AP did not pay the amounts due under the agreements and claims in breach of contract and debt with respect to the two alleged agreements.
- [2] AP contends that liability with respect to the contract claims advanced in the present litigation is inextricably linked to liability in a negligence action commenced by AP in Korea in which RMS is the defendant. Thus, AP asserts that the courts in British Columbia do not have jurisdiction, or in the alternative, should decline to exercise jurisdiction as Korea is the most appropriate forum. RMS asserts that the contract claims are distinct from the negligence proceedings.

- [3] In this application, AP seeks an order staying this proceeding on the grounds that:
- a) The court does not have jurisdiction over the defendant in respect of the claims made against the defendant in this proceeding; or,
 - b) In the alternative, the court ought to decline to exercise jurisdiction over the defendant in respect of the claims made against it in this proceeding.

Background

- [4] The plaintiff, RMS, is an extra-provincial company incorporated pursuant to the laws of Canada. RMS operates a helicopter engine repair and maintenance business, including maintenance and repair of the S61 and its engines. Its main premises are located in Parksville, British Columbia. RMS has no offices or facilities in Korea. None of its employees are based in Korea, although from time to time it has sent employees to work on specific projects in Korea on a temporary basis.
- [5] One part of RMS's business is to rent helicopter engines to customers for use while RMS is repairing the customer's helicopter engine. The rental engines are owned by RMS and, when not rented, stored and maintained in British Columbia.
- [6] The defendant, AP, is a Korean corporation which operates a commercial helicopter enterprise based in South Korea.
- [7] From time to time, beginning in 2010, RMS performed engine and helicopter component repair and maintenance work for AP at its facility in Parksville. From time to time, when AP left a helicopter engine at the RMS facility in Parksville for repair, AP would rent a substitute engine from RMS.
- [8] In June 2010, AP purchased a S61N helicopter for use in its business in Korea. In March 2015, AP sent the engine of this helicopter to the RMS facility in Parksville for regular inspection and maintenance. The engine was returned to Korea on or about October 20, 2015, and installed in the helicopter.
- [9] On or about October 29, 2015, there was an incident involving the helicopter which caused some damage to the engine. RMS agreed to repair the engine. RMS personnel removed the fuel control unit and installed a temporary replacement unit. The fuel control unit was sent to the RMS facility for repair.
- [10] Once the repair was completed, RMS sent two of its engineers to Korea to replace the temporary unit with the repaired unit. This work was done between September 21, 2016 and September 23, 2016.

- [11] A test flight of the helicopter was conducted on September 23, 2016. A hot start or over temperature event occurred resulting in serious damage to the helicopter. Following the hot start incident, the engine was removed from the helicopter airframe and, with the consent of AP, sent to the RMS facility in Parksville for inspection and assessment.
- [12] As noted above, RMS alleges that AP entered into an agreement with RMS to repair the engine, and a separate agreement for the rental of a replacement engine. RMS alleges that in breach of these agreements, AP has not paid the amounts due under the contracts.
- [13] Following the hot start incident, two actions were commenced. In or about July 2017, AP commenced an action in Korea claiming damages arising from what it alleged to be the negligence of RMS in relation to the repair of the engine. That case was heard in Korea and, in a judgment issued August 30, 2019, AP's claim was dismissed. AP has appealed the judgment but the appeal has not been heard.
- [14] RMS initiated the present litigation in British Columbia advancing claims of debt and breaches of contract. In the notice of civil claim filed February 28, 2018, RMS pleads that on or about November 28, 2016, the parties entered into an agreement whereby RMS would repair the engine for AP for the sum of \$207,706.39US inclusive of parts and labour (the "Repair Agreement").
- [15] RMS pleads that:
11. The Repair Agreement contained, without limitation, the following express or implied terms:
 - (a) RMS would repair Engine 280324KLC with respect to the damage it sustained on September 23, 2016;
 - (b) The repair of Engine 280324KLC by RMS would be performed in British Columbia;
 - (c) RMS would invoice the defendant from British Columbia at the completion of the repair of Engine 280324KLC;
 - (d) The defendant would pay for the repair of Engine 280324KLC upon receipt of the applicable invoices; and
 - (e) Interest would accrue at 1.5% per month from the date of the invoice.
 12. By mid-December 2016, RMS had completed the repair of Engine 280324KLC in accordance with the Repair Agreement.
 13. All the repair work by RMS under the Repair Agreement was performed in British Columbia.
 14. RMS issued invoice #3398 to the defendant in the amount of \$12,392.90 USD and invoice #3431 to the defendant in the amount of \$195,313.49 USD. Both invoices pertained to RMS's repair of Engine 280324KLC. The total of the two invoices is \$207,706.39 USD.

15. In breach of the Repair Agreement, the defendant has neglected, failed and/or refused to pay the amount owed under the invoices or any part thereof, and the full amount of the repair costs and expenses for Engine 280324KLC, plus interest, is due and owing to RMS.
- [16] RMS alleges further that on or about September 23, 2016, the parties entered an agreement whereby RMS would rent an engine assembly to AP while the engine was being assessed and/or repaired by RMS (the "Rental Agreement").
- [17] With respect to the Rental Agreement, RMS pleads that:
 20. The Rental Agreement contained, without limitation, the following express or implied terms:
 - (a) RMS would deliver to the defendant from British Columbia its CT58 engine, serial number 295033 (the "Rental Engine");
 - (b) The defendant would be solely responsible for attaching and detaching the Rental Engine to and from the S61 helicopter airframe;
 - (c) The defendant would maintain and service the Rental Engine as per all applicable maintenance schedules;
 - (d) The defendant would pay \$330 USD per hour for the Rental Engine, with a minimum rental charge of 20 hours per month;
 - (e) The Rental Agreement would be subject to the RMS standard rental terms and conditions which included a British Columbia law and jurisdiction provision;
 - (f) The Rental Engine would be returned to RMS by the defendant within a reasonable period of time after the repairs to Engine 280324KLC had been completed by RMS;
 - (g) RMS would invoice the defendant from British Columbia for the Rental Engine;
 - (h) The defendant would pay for the rental fees for the Rental Engine upon receipt of the applicable invoices; and
 - (i) Interest would accrue at 1.5% per month from the date of the invoice.
 21. Engine 280324KLC was repaired by RMS by approximately mid-December 2016. The defendant then agreed to return the Rental Engine to RMS on or about January 1, 2017.
 22. RMS issued invoices #3390, #3422, and #3448 to the defendant in the total amount of \$23,924.44 USD for rental charges for the Rental Engine up to December 31, 2016.
 23. In breach of the Rental Agreement, to date the defendant has neglected, failed, and/or refused to pay the amount owed under the invoices up to December 31, 2016 or any part thereof, and the full amount of the rental costs and expenses up to that date, plus interest, is due and owing to RMS.

24. After January 1, 2017, the defendant continued to possess and use the Rental Engine in its S61 helicopter in the course of its commercial helicopter operations. Despite repeated demands by RMS for its return, the Rental Engine was not returned to RMS on or about January 1, 2017, as the defendant had previously agreed.
25. As of January 1, 2017, RMS advised the defendant that the rental charged for the Rental Engine would be amended to \$500 USD per hour with a three hour per day minimum. By continuing to use the Rental Engine in its S61 helicopter after January 1, 2017, the defendant acceded to and accepted these terms. This engine rental rate has been accruing at \$1,500 USD per day, plus interest, since January 1, 2017.
26. In breach of the Rental Agreement, the defendant has to date neglected, failed and/or refused to return the Rental Engine to RMS or pay any amount owed under the Rental Agreement, or any part thereof, and the full amount of the rental costs and expenses, plus interest, is due and owing to RMS.
27. RMS has and continues to suffer loss and damage as a result of the defendant's breach of the Rental Agreement.
- [18] RMS pleads in the alternative that it is entitled to recover the value of the repair costs on the basis of unjust enrichment and quantum meruit and claims against AP in conversion and detainment with respect to the Rental Engine.

Territorial Competence

- [19] The first issue is whether a court of British Columbia has territorial competence, formerly described as jurisdiction simpliciter, over this action. The issue is to be considered by reference to the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [Act].
- [20] Territorial competence is defined in s. 1 of the Act as follows:

"territorial competence" means the aspects of a court's jurisdiction that depend on a connection between

 - (a) the territory or legal system of the state in which the court is established, and
 - (b) a party to a proceeding in the court or the facts on which the proceeding is based.
- [21] Part 2 of the Act deals with the issue of territorial competence. Section 2(2) mandates that the territorial competence of a court of British Columbia "is to be determined solely by reference to" Part 2 of the Act.
- [22] Section 3 identifies the circumstances in which the court has territorial competence in a proceeding brought against a person. The relevant provision for the purpose of this application is s. 3(e) which provides:

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.

[23] Section 7 of the Act sets out criteria of ordinary residence of a corporation for the purposes of Part 2 of the Act. Section 7 provides:

7 A corporation is ordinarily resident in British Columbia, for the purposes of this Part, only if

- (a) the corporation has or is required by law to have a registered office in British Columbia,
- (b) pursuant to law, it
- (i) has registered an address in British Columbia at which process may be served generally, or
- (ii) has nominated an agent in British Columbia upon whom process may be served generally,
- (c) it has a place of business in British Columbia, or
- (d) its central management is exercised in British Columbia.

[24] In relation to s. 3(e), s. 10 of the Act sets out a non-exhaustive list of circumstances any of which give rise to a presumption that a real and substantial connection exists between a proceeding and British Columbia. The relevant provisions of the section for purposes of this application are as follows:

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

- (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,
- (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
- (i) property in British Columbia that is immovable or movable property,
- (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,
- (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,
- (h) concerns a business carried on in British Columbia,

[25] With respect to the determination of territorial competence:

- a) The burden of establishing territorial competence rests with the party who asserts its existence: *Budget Rent a Car v. Philadelphia Indemnity Insurance*, 2018 BCSC 163 at para. 36;
 - b) The plaintiff has the burden to establish a good arguable case that a real and substantial connection exists. The burden is not proof on a balance of probabilities: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at paras. 34-35, 54; *Budget* at para. 36;
 - c) The court is to consider the pleadings and any evidence adduced by the parties to determine "whether there are facts alleged, which if true, would found jurisdiction": *Purple Echo* at para. 34;
 - d) It is not open to the court on an application to determine territorial competence to make findings of fact on disputed evidence: *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 20, leave to appeal ref'd [2012] S.C.C.A. No. 367;
 - e) The presumption of a real and substantial connection in s. 10 is a mandatory presumption with basic facts, which are those set out in the subsections. These are taken to be true if pleaded: *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para. 22, leave to appeal ref'd [2010] S.C.C.A. No. 68;
 - f) While the presumption in s. 10 is rebuttable, it is likely to be determinative in almost all cases: *Stanway* at para. 22; and,
 - g) Once the plaintiff has established an arguable case for territorial competence, the burden is on the defendant to rebut the presumption by satisfying the court that it is plain and obvious that the action could not lie within the territorial competence of a British Columbia court: *Fairhurst* at para. 32; *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at paras. 35, 60 [JTG 2014], aff'd 2015 BCCA 200 at paras. 19-20, 40 [JTG 2015].
- [26] RMS submits that there is a real and substantial connection between British Columbia and the facts on which the proceeding against AP is based such that a British Columbia court has territorial competence pursuant to s. 3(e) of the Act.
- [27] With respect to the Repair Agreement, RMS notes that the repair work was performed in British Columbia. An agreement was reached between the parties on November 28, 2016 for RMS to perform the repairs in British Columbia. The engine had already been transported to British Columbia by November 28, 2016, and all of the inspection and repair work was to be performed in the province.
- [28] RMS submits that in determining whether a contract is to be performed to a substantial extent in British Columbia, the court is to look at the entire contract, the nature of the obligations under it and the expectations of the parties at the time the contract is entered, citing JTG 2015 at para. 36.

- [29] RMS submits that in the present case, all of the obligations to inspect and repair the engine were to take place in British Columbia and this was the expectation of the parties at the time the contract was made. Thus, RMS submits that the cause of action concerns contractual obligations that were, to a substantial extent, to be performed in British Columbia. This brings the claim within s. 10 (e)(i) of the Act and a real and substantial connection is presumed.
- [30] In addition, RMS submits that the repair claim concerns a business carried on British Columbia, an additional factor pursuant to s. 10(h) of the Act. Counsel notes that it is part of RMS's business to repair helicopter engines and a specific helicopter engine repair is the subject matter of this action.
- [31] With respect to the Rental Agreement, RMS submits that its obligations were to be performed in British Columbia in that RMS had to source and inspect a rental engine, and then ship that engine from British Columbia to Korea. Counsel submits that it is no bar to the operation of s. 10(3)(i) that a contract is intended to be performed in more than one jurisdiction, citing JTG 2015 at para. 37. Thus RMS submits that s. 10(e)(i) applies to the rental claim.
- [32] In addition, RMS submits that s. 10(h) applies because the engine rental is part of the business of RMS and this business is the subject matter of the action. Further, RMS submits that the Rental Agreement is a contract that by its express terms is to be governed by the law of British Columbia and therefore s. 10(e)(ii) of the Act also applies.
- [33] With respect to the alternate pleas, RMS submits that quantum meruit is a restitutionary remedy for unjust enrichment. Therefore, s. 10(f) applies since this claim concerns restitutionary obligations which, to a substantial extent, arose in British Columbia. Finally, the tort of conversion has been alleged with respect to the rental engine. RMS asserts that this tort occurred in British Columbia because this is where RMS has suffered damage and loss, bringing the claim within the provisions of s. 10(g).
- [34] Finally, RMS submits that the court should assume jurisdiction over the entire claim if a real and substantial connection is shown with respect to either cause of action, citing *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 99.
- [35] I agree with the submissions of RMS concerning territorial competence. I find that RMS is ordinarily resident in British Columbia pursuant to s. 7 of the Act. I find further that RMS has established an arguable case that both the repair and the rental claims concern contractual obligations that were, to a substantial extent, to be performed in British Columbia, and that both concern a business carried on in British Columbia, thus bringing the claims within the presumptions of ss. 10(e)(i) and (h). RMS has pleaded that the Rental Agreement, by its express terms, is governed by the law of British Columbia, there by falling within the scope of s. 10(e)(ii). The alternate plea of conversion concerns a tort committed in British Columbia as submitted by RMS thus engaging s. 10(g) and the claim alleging unjust enrichment and seeking recovery by virtue of quantum meruit engages s. 10(f).

- [36] I conclude that RMS has established an arguable case for the territorial competence of the British Columbia court. The burden now shifts to AP to establish that it is plain and obvious that the action could not lie within the territorial competence of the British Columbia courts.
- [37] In that regard AP submits first that RMS does not have a viable action. AP asserts that testimony given by Grant Falkenberg at the negligence trial in Korea constituted an admission, binding on RMS in the present action, that RMS never repaired the engine, citing *Glover v. Leahey*, 2018 BCCA 56 at para. 28.
- [38] In *Glover* at paras. 27-31, Justice Willcock, for the court, noted the distinction between formal and informal admissions. A formal admission made in an action is binding only for the purpose of the particular case in which it is made. A formal admission is admissible in another action only as an informal admission. An informal admission is not conclusive but is merely a matter of evidence.
- [39] In the present case, RMS has objected to the extracts of transcripts appended to the first affidavit of Kang Ho Lee upon which AP relies for this submission.
- [40] RMS forwarded with the materials an unfiled affidavit of Mr. Falkenberg but did not refer to it at the hearing or in its written submissions. I did not read this affidavit and it formed no part of my deliberations. In addition, by letter dated July 2, 2020, forwarded to the registry after the application had been heard and was under reserve, counsel for AP forwarded an unfiled affidavit of Gwanjoong Kim dated June 22, 2020. I did not read this affidavit and it formed no part of my deliberations.
- [41] In my view, assuming without deciding the admissibility of the transcript evidence relied upon by AP, at its highest the evidence could amount to an informal admission. As such it is a matter for trial to be considered along with all of the other evidence. At trial, RMS would be permitted to lead evidence to explain or contradict the previous statement, *Glover* at para. 28. It is not therefore an admission binding on RMS for the purpose of the present application in the manner that AP contends.
- [42] AP has submitted that RMS requires leave to adduce evidence to contradict its admission, citing *Ewing v. Dominion Bank* (1904), 35 S.C.R. 133 at 153. In my view, *Ewing* is entirely distinguishable on its facts. It deals with the duty of a person who learns that his name has been used without authority as the maker of a note in favour of a bank for cash or credit already given or to be given, to notify the bank promptly that his name was used without authority or is a forgery.

- [43] With respect to admissions pursuant to the Supreme Court Civil Rules, a party must seek leave in the action to withdraw a formal admission that has been made in that action (R. 7-7(5)). However, no leave is required to lead evidence to explain or contradict an admission made in another action (Glover at para. 28). Thus, in my view, RMS does not require leave to adduce evidence explaining or contradicting the evidence relied upon by AP either in this application or at the trial of the matter.
- [44] AP submits that RMS was required to make an evidentiary response to the evidence adduced by the defendant, failing which it has failed to establish a good arguable case, citing *AG Armeno Mines and Minerals Inc. v. Newmont Gold Co.*, 2000 BCCA 405 at paras. 19-20, 23, 25-28. It submits that RMS has not done so in the present case and therefore has failed to discharge its burden with respect to territorial competence.
- [45] In *AG Armeno* at para. 19, Justice Mackenzie, for the court, noted that issues of jurisdiction simpliciter normally fall to be decided on the pleadings alone. However, where the evidence introduced by the foreign defendant contradicts material facts pleaded by the plaintiff or otherwise proves facts that would be fatal to the plaintiff's claim, the plaintiff must then make out "a good arguable case" on the evidence.
- [46] The approach outlined by the court in *AG Armeno* must be read in light of *Stanway*. In that case Justice Smith, for the court, referred to the approach described in *AG Armeno* (see at para. 20) and noted as follows:
- [21] In my view, this approach has been eclipsed by the enactment of the CJPTA, which signals a legislative intention to settle the law on territorial competence and by Rule 14 of the Rules of Court [now R. 21-8, see *JTG 2014* at para. 35], proclaimed in force at the same time, which sets out the procedure for challenging territorial competence. When a challenge is made to territorial competence, the presumption in s. 10 of the CJPTA comes into play. In *R. v. Oakes*, [1986] 1 S.C.R. 103 at 115-16, the Court discussed the nature of presumptions in this passage:

Presumptions can be classified into two general categories: presumptions without basic facts and presumptions with basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact (see *Cross On Evidence*, 5th ed., at pp. 122-23).

Basic fact presumptions can be further categorized into permissive and mandatory presumptions. A permissive presumption leaves it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact. A mandatory presumption requires that the inference be made.

Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. First, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Thirdly, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

- [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.
- [47] AP's submission that RMS was required to make an evidentiary response to the evidence it adduced occurs in the section of the notice of application that referred to the informal admission of Mr. Falkenberg in the Korean trial. AP submits that this evidence is to the effect that RMS never repaired the engine. With this exception, AP has not particularized which evidence it asserts that RMS was obliged and failed to answer.
- [48] However, contrary to AP's submission, RMS has adduced evidence that addresses that material fact. In his first affidavit, Michael Wiggins, president and chief executive officer of RMS, deposes that the engine was repaired and has been ready for return to AP since mid-December 2016. In any event as noted above, RMS has pleaded facts bringing it within the presumption of a real and substantial connection enumerated in s. 10 of the Act. As noted in Stanway at para. 22, the presumption is rebuttable, but in my view AP has failed to do so in the present case.
- [49] In summary, the evidence given by Mr. Falkenberg in the Korean proceedings constitutes, at it highest, an informal admission. As such it is not binding on RMS in this proceeding, but is a matter of evidence. RMS does not require leave to adduce evidence explaining or contradicting the evidence. As noted above, RMS has adduced such evidence.
- [50] It is clearly not the role of the Court on the present application to decide the case on the merits or to find facts on disputed evidence. However, I am satisfied on the basis of the pleadings and review of the evidence that RMS has established a good arguable case.
- [51] AP's second submission with respect to the issue of territorial competence is that the principles established in Stanway at paras. 19-22, should be overruled. AP acknowledges that this is not a submission that can be entertained in this Court.
- [52] AP's final submission with respect to the issue of territorial competence is that both the Repair Agreement and the Rental Agreement between the parties are contingent upon, and ancillary to, the hot start incident and the negligence claim in Korea. Thus, citing *Roed v. Scheffler*, 2009 BCSC 731 at para. 27, AP submits that the court should not hold that it has territorial competence over a proceeding concerning contracts that are clearly ancillary to the primary dispute.

- [53] In *Roed*, the plaintiff commenced proceedings in British Columbia arising from a motor vehicle accident that occurred in the State of Washington. Both the driver and the owner of the vehicle that struck Ms. Roed's vehicle resided in Washington (at para. 2). The court concluded that the tort was committed in Washington (at para. 23).
- [54] Ms. Roed maintained that territorial competence could also be established because of the subrogation rights of private insurers, the BC Medical Services Plan and ICBC. The insurance contracts would be an issue because she is obliged to seek reimbursement for special damages to satisfy her obligations under these contracts.
- [55] Justice Bruce rejected this contention stating:
- [26] Ms. Roed also maintains territorial competence is presumptively present because her action involves the interpretation of contractual obligations that are to be performed in British Columbia and because the action was brought to enforce a contract in relation to an action located in BC. Relying on ss. 10(c) and (e) of the Court Jurisdiction and Proceedings Transfer Act, Ms. Roed argues the subrogation rights of the private insurers, the BC Medical Services Plan, and ICBC, pursuant to their contracts of insurance, will be an issue in the proceedings because she is obliged to seek reimbursement for special damages to satisfy her obligations under these contracts. Ms. Scheffler argues ss. 10(c) and (e) were only intended to apply to contracts that form the subject of the litigation and to which the defendant is a party.
- [27] In my view, ss. 10(e) was intended to encompass proceedings in which the core of the action involves contractual obligations that were, to a substantial extent, performed in British Columbia. The language of s. 10(c) is even clearer. The contract must be "brought" to interpret, set aside or enforce a contract. This provision does not encompass contracts that may be interpreted during the proceedings but do not form the subject matter of the action. Section 10 of the Act describes circumstances which are presumed to meet the real and substantial connection test. To hold that the court has territorial competence over a proceeding because of a contract that is clearly ancillary to the primary dispute between the parties is inconsistent with the most liberal and expansive application of the "real and substantial connection" test. At the very least the foreign defendant should be a party to the contract. Accordingly, I am unable to accept that territorial competence is presumed under s. 10(c) or s. 10(e).
- [56] This case is clearly distinguishable from *Roed* on its facts. In the present case, unlike the situation in *Roed*, AP is alleged to be a party to both the Repair Agreement and the Rental Agreement. These are the two contracts that form the subject of the litigation. The Repair Agreement is alleged to have been performed in British Columbia. They are clearly not ancillary to the dispute but rather are the core of the dispute between the parties in this litigation.

- [57] AP also submits that both the Repair Agreement and the Rental Agreement are contingent upon the events giving rise to the negligence claim; that the negligence claim is the primary dispute and both the Repair Agreement and the Rental Agreement are ancillary. It notes the evidence from its deponents that the understanding of the parties was that whoever was found to be responsible for the damage, would pay for the repair and rental.
- [58] In my view, the fact that the incident that gave rise to the negligence action was the reason that the engine needed to be repaired, and a substitute engine rented during the interim, does not mean that the negligence action and the contracts claims are indivisible in a legal sense. I note that the Korean court did not believe that was the case as it found that the actions could proceed in parallel in different jurisdictions. I note further that in the present action, RMS is not attempting to retry the negligence claim.
- [59] In the result, I am satisfied that AP has not established that it is plain and obvious that the action could not lie within the territorial competence of the British Columbia courts. I find that the British Columbia court has territorial competence in relation to this litigation.

Declining to Exercise Territorial Competence

- [60] The next issue is whether to exercise the court's discretion to decline to exercise its territorial competence pursuant s. 11 of the Act. Under s. 11, which codifies the common law doctrine of *forum non conveniens* (*Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 at para. 22), a British Columbia court can decline to exercise its jurisdiction if persuaded that another forum exists that is clearly more appropriate.

- [61] Section 11 of the Act sets out the factors that must be considered in the exercise of this discretion. It provides:

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.

[62] Despite s. 11 being a codification of the forum non convenience doctrine, the mandatory factors enumerated in the section are not exhaustive: Budget at para. 39; *The Original Cakerie Ltd. v. Renaud*, 2013 BCSC 755 at para. 52. In addition to the s. 11 factors, the court in *The Original Cakerie* at para. 53, outlined common law factors the court may consider as part of the analysis:

- (1) where each party resides;
- (2) where each party carries on business;
- (3) where the cause of action arose;
- (4) where the loss or damage occurred;
- (5) any juridical advantage to the plaintiff in this jurisdiction;
- (6) any juridical disadvantage to the defendant in this jurisdiction;
- (7) the convenience or inconvenience to potential witness;
- (8) the cost of conducting the proceeding in this jurisdiction;
- (9) the applicable substantive law;
- (10) the difficulty and cost of proving foreign law, if necessary;
- (11) whether there are parallel proceedings in any other jurisdiction.

[63] With respect to the exercise of the court's discretion:

- a) The court must consider all relevant factors listed in s. 11 to determine if a stay is warranted: *Teck Cominco* at para. 21;
- b) The court must also consider s. 11(1): the interests of the parties and the ends of justice, and in particular, the prima facie right of the plaintiff to its chosen forum: *Ruloff Capital Corporation v. Hula*, 2013 BCSC 322 at para. 44, aff'd 2013 BCCA 514 at paras. 14, 29; *Purple Echo* at para. 59;
- c) The weighing of each factor is a matter of discretion and no one factor is determinative: *Teck Cominco* at paras. 24-30; *Purple Echo* at para. 59; Budget at para. 40;
- d) The right of the plaintiff to choose its forum is a mandatory consideration; therefore the discretion to decline jurisdiction is only for the exceptional case: Budget at para. 40;
- e) The burden is on the applicant to demonstrate that the alternative forum is "clearly more appropriate", thereby displacing the plaintiff's choice of forum: *Club Resorts* at paras. 108-109; *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 343 at para. 37; and,

- f) The threshold will be met where the alternative forum has a significant advantage, in that it "would be fairer and more efficient" for disposing of the litigation: *Club Resorts at para. 109; Andrew Peller Ltd. v. Mori Essex Nurseries Inc.*, 2017 BCSC 203 at para. 30, citing *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30 at para. 52; *Olney v. Rainville*, 2009 BCCA 380 at para. 42.

Comparative convenience and expense

- [64] With respect to the issue of comparative convenience and expense, the relevant common law factors include where each party resides, where each carries on business, the convenience or inconvenience of witnesses and the costs of conducting the litigation in this jurisdiction.
- [65] RMS resides in British Columbia and AP resides in Korea. This factor is in my view neutral.
- [66] AP carries on business in Korea. While RMS performs work in Korea from time to time, it has no offices or permanent personnel in that jurisdiction. It carries on business in British Columbia. The engine was transported to the RMS facility after the hot start incident. RMS pleads that this was done with the consent of AP. In my view, this factor slightly favours British Columbia.
- [67] AP submits that the comparative convenience and expense factor favors AP because it has enumerated a lengthy list of witnesses who would be required. AP submits that RMS has provided no such list.
- [68] The AP list is premised on the contention that if the matter is heard in British Columbia, the court would be engaged in re-litigating the negligence claim. In submissions it asserts that the Repair Agreement and the Rental Agreement arose from the hot start incident and that the parties "understood" that whoever was found to be at fault for the damage, would be responsible for the costs of repair and rental.
- [69] In its jurisdictional response pleading AP concedes that the parties entered into a rental agreement on September 23, 2016. AP asserts that the parties failed to come to an agreement with respect to the repair of the damaged engine and that the plaintiff unilaterally took it upon itself to repair the engine without the consent, authorization or agreement of the defendant.
- [70] RMS submits that this action is not dependent on findings of fault in relation to the over temperature event that occurred in Korea. It submits that the contracts were not contingent as AP contends, and notes that none of the written exchanges between the parties contain reference to any such contingency.
- [71] RMS submits that the witnesses would be persons who had knowledge of and dealings with the terms of the Repair Agreement and the Rental Agreement. Mark Kelly, RMS's chief financial officer, asserts that he, Mr. Wiggins and Mr. Lee, AP's chief financial officer, are the primary persons who were involved. He deposes that the workers who inspected and

repaired the engine in late 2016 would also be necessary if AP disputes the engine repair account. RMS notes that all but two of AP's proposed witnesses are in relation to the over temperature event, not the contractual issues.

- [72] I am not persuaded that a trial of the contractual claims in British Columbia would entail re-litigation of the negligence claims. As matters stand, the negligence claim has been dismissed. If AP succeeds on appeal in the negligence claim, then its contention that the agreements contain the contingency it asserts, could be pleaded as a set off.
- [73] While there is inconvenience and expense for whichever party litigates in the foreign court, in my view this factor slightly favours British Columbia.

The law to be applied to the proceeding

- [74] With respect to the question of which law is to be applied, the relevant common law factors are where the cause of action arose, where the loss or damage occurred, the applicable substantive law and the difficulty of proving foreign law, if necessary.
- [75] The Court of Appeal noted in *Douez v. Facebook, Inc.*, 2015 BCCA 279 at para. 83, rev'd on other grounds 2017 SCC 33, that the court is to consider this factor but not necessarily decide it. It may not be possible to resolve the issue of the law to be applied at such an early stage of the litigation (see also *Budget* at para. 41).
- [76] AP submits that Korean law must be applied because the cause of action, negligence, and the damage occurred in Korea. It submits that the Korean court would clearly apply Korean law to both the negligence and contract claims and therefore there would be no need to prove foreign law if the litigation took place in Korea. If the litigation takes place in British Columbia, the court would have to apply Korean law which would add an unnecessary element of expense and complexity.
- [77] RMS submits that the contracts would be deemed to be made in British Columbia. The causes of action arose in British Columbia and the damage arising from the breaches of contract occurred here. The law to be applied is British Columbian law and there would be no necessity to prove foreign law if the matter is litigated in British Columbia.
- [78] With respect to where the contracts were made, in *Key Pile Camp (2008) Ltd. v. Donaghy*, 2016 BCSC 2226 at para. 35, Justice Church noted that:

The general rule of contract law is that a contract is made in the location where the offeror receives notification of the offeree's acceptance. When a contract is transmitted electronically and instantaneously, the contract is usually considered to be made in the jurisdiction where the acceptance is received.

- [79] With respect to both contracts, RMS is the offeror and AP the offeree. RMS contends that in both cases AP communicated its acceptance to RMS by email. RMS contends that the Rental Agreement offer was sent by email of September 23, 2016, and that acceptance was received from AP by email the same day. RMS contends that the Repair Agreement was entered into on or about November 28, 2016, again through an exchange of emails with the acceptance received in Parksville.
- [80] AP contended in oral submissions that the Rental Agreement was made in Korea on the day of the hot start incident and that the Repair Agreement is purely collateral. As noted above, in its pleadings AP asserted that the Rental Agreement was made on September 23, 2016, and denies that there was an agreement for the repair of the helicopter engine.
- [81] The RMS pleadings and evidence suggest that both agreements were made in British Columbia, the jurisdiction in which the electronic transmission of acceptance was received.
- [82] With respect to where the agreements were to be performed, as the Court of Appeal noted in JTG 2015 at para. 37:

It is entirely possible to have an international contractual arrangement whereby both parties to the contract perform obligations "to a substantial extent" in their home jurisdictions.

- [83] In the present case, RMS asserts that the repair work was to be and was performed in British Columbia. The rental engine would have shipped from British Columbia and would have been maintained and stored in this jurisdiction. This suggests that both agreements were to be substantially performed in British Columbia.
- [84] Finally, the alleged breach with respect to both agreements was committed by AP failing to make payments under the contracts in British Columbia.
- [85] In *Moore v. NextEnergy Inc.*, 2012 BCSC 458 at para. 63, Justice Gerow noted that:
- Where no express choice is made, the proper law of the contract can be inferred from the circumstances, or failing this, be determined by which system has the closest and most substantial connection with the subject matter: *Pope v. Talbot Ltd. (Re)*, 2009 BCSC 1552 at paras. 33 and 35.
- [86] In this case there is no express choice made with respect to the Repair Agreement. Given that the work was to be performed in this jurisdiction and the damage suffered here, this favours British Columbia as the appropriate forum.
- [87] AP has argued that a Korean court would apply Korean law to both the negligence and contract claims. It is clear from the decision that the court applied Korean law to the negligence claim. There is, however, no evidence with respect to what law a Korean court would find was to be applied in relation to the contract claims and counsel did not elaborate on this contention in submissions.

- [88] AP submits that the British Columbia court would have to apply Korean law to the claims if the matter is litigated here, arguing that the negligence occurred in Korea and that is where the damage occurred. This, however, relates to the negligence claim and not the claims brought in contract. In my view, it does not follow that Korean law would apply to the contract claims because it applied to the tort claims. They are distinct causes of action.
- [89] For the purpose of this application. I think it is more likely than not that British Columbia law would apply to the contract claims that are at issue in this litigation. This factor favours British Columbia as the most appropriate forum.

Avoiding multiple legal proceedings and conflicting decisions in different courts

- [90] The next two statutory factors are the desirability of avoiding a multiplicity of legal proceedings and conflicting decisions in different courts. Related common law factors are the existence of parallel proceedings, and the legitimate juridical advantages and disadvantages in the competing jurisdictions.
- [91] AP argues that the proceedings in Korea are parallel proceedings dealing with the same subject matter. It submits that such proceedings are to be avoided unless the party resisting the application for a stay can demonstrate possible loss of juridical advantage, citing 472900 B.C. Ltd. v. Thrifty Canada Ltd. (1998), 57 B.C.L.R. (3d) 332 at paras. 32, 53 (C.A.); Ingenium Technologies Corp. v. McGraw-Hill Companies, Inc., 2005 BCCA 358 at para. 15; Teck Cominco at para 27.
- [92] AP submits that the facts underlying the negligence and contract claims are so closely interrelated that the multiple proceedings would be adjudicated on almost identical facts and issues, citing Check Group Canada Inc. v. Icer Canada Corporation, 2010 NSSC 463 at para. 53. In addition, AP submits that the potential for conflicting decisions is high, citing Hormandinger v. Bender-Hormandinger, 2007 BCSC 949 at para. 52.
- [93] RMS submits that there are no parallel proceedings. The contract claims that are at issue in the present action are distinct legally and factually from the negligence action. At present the negligence action stands as dismissed. However, if AP does succeed on appeal, the judgment can be registered as a set off in the contract action. There is no need to retry the issues in the negligence action in British Columbia. There is therefore no potential for conflicting decisions.
- [94] RMS notes that the Korean court addressed the issue of forum in its decision in the negligence action. In that action, RMS sought to have the Korean court decline jurisdiction on the basis of, inter alia, the current litigation in British Columbia. The Korean court held that:

the causes of action are different between the lawsuit of this case seeking a remedy of compensation and the Canadian lawsuit of this case seeking a remedy of the repair costs and rental payment. Thus, suitability, promptness and effectiveness of the lawsuit won't be impeded even though the lawsuit of this case proceeds in the court of The Republic of Korea and the Canadian lawsuit of this case proceeds in the Canadian court respectively;

- [95] RMS notes that, in the alternative, if the court concludes that there are parallel proceedings, this is but one factor to be considered with all of the others, citing *Teck Cominco* at para. 31; *Ruloff Capital* at paras. 56; *Breeden v. Black*, 2012 SCC 19 at paras. 26-27.
- [96] I agree with RMS that there are no parallel proceedings. The Korean court has not assumed jurisdiction with respect to the claims advanced in the present litigation. The negligence action involves distinct facts and causes of action. There are no proceedings in another jurisdiction dealing with the matters raised in the present action. As noted above, I also agree that there will be no need to retry the issues in the negligence action in this court. If AP succeeds on appeal, it can deal with its judgment as a matter of set off.
- [97] I also agree that, contrary to AP's submission, the issue of parallel proceedings is but one factor to be considered by the court. In the leading case, *Teck Cominco*, each party had commenced proceedings in different jurisdictions to determine the same issue, arising from the same facts. The foreign court had asserted jurisdiction and refused to stay its action. The Supreme Court of Canada sustained the decision of the chambers judge to dismiss Teck's motion to stay the British Columbia action.
- [98] Further, unlike the circumstances in *Teck Cominco* and *Hormandinger*, in the present case the Korean court is not dealing with the claims at issue in this litigation and in fact has expressly contemplated that the respective actions would proceed in Korea and British Columbia.
- [99] I agree with AP that RMS has not established a juridical advantage to litigating in this jurisdiction. In my view, neither party has established a case of either juridical advantage or disadvantage with respect to proceedings in either jurisdiction. However, as noted above, I do not agree with AP's submission that RMS is required to show a juridical advantage because of the existence of parallel proceedings. As noted, in my view the proceedings are not parallel. In any event, in my view, AP's formulation is not a correct statement of the law.
- [100] With respect to the issues of juridical advantage and disadvantage, I find these to be neutral.
- [101] I note that AP submitted two affidavits from Gwanjoong Kim which contain, inter alia, opinion evidence with respect to Korean law and procedure. Mr. Kim is retained as AP's lawyer in the Korean negligence appeal.

- [102] RMS objected to the affidavits at the hearing. AP submitted that since RMS had not given notice in its materials, the Court could not consider the objection. In addition, AP submitted that because of the prejudice it would suffer if the affidavits were excluded in these circumstances, it must be given leave to file new expert reports, if the affidavits are excluded.
- [103] AP has not identified under which rule of the Supreme Court Civil Rules notice is required. If AP seeks to rely on R. 11-6(10) of Part 11 dealing with experts, I note the affidavits are not expert reports in compliance with Rules 11-2(1), (2) or 11-6(1), making R. 11-6(10) inapplicable because RMS did not receive "an expert report under this rule". In addition, R. 11-6 addresses expert reports "to be tendered as evidence at trial".
- [104] Regardless of notice, affidavits "must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at a trial" (R. 22-2(12)). Rule 22-2(13) establishes an exception for hearsay in certain circumstances. The court has the jurisdiction to strike or ignore inadmissible portions of affidavits, or reject an affidavit in its entirety: *McMahon v. Harper*, 2017 BCSC 2328 at para. 108; *I.A.L. v. Y.C.*, 2019 BCSC 714 at paras. 19-20. Practically, given the time constraints on chambers hearing, "the court simply chooses not to give any weight to the inadmissible passages, without any formal order regarding the inadmissible passages" because to do otherwise risks falling into legal error: *McMahon* at para. 109.
- [105] It is a requirement of the common law, and R. 11-2(1), that an expert is not an advocate for any party. An expert must be impartial, independent and unbiased, they must be able to provide the court with "fair, non-partisan and objective assistance": *Whaley v. Bryant*, 2020 BCSC 531 at paras. 16-17, citing *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 10, 50. Determining the issue of bias, as a threshold requirement for admissibility, requires an assessment of the "nature and extent of the interest or connection with the litigation or a party thereto": *White Burgess* at para. 49.
- [106] Mr. Kim is in fact AP's appeal counsel in the Korean litigation. It is clear that he is acting in the capacity of an advocate since, for example, he describes as fact, the assertions of AP in the negligence action and states that the Korean court erred in dismissing AP's claim. Mr. Kim's evidence suffers from "actual bias" and it is clear his opinion evidence with respect to Korean law and procedure "should not be admitted": *Whaley* at para. 17; *White Burgess* at para. 10. I have ignored Mr. Kim's affidavits in their entirety.
- [107] In paragraph 27 of the first affidavit of Mr. Kelly, the deponent set out observations of his experience at the Korean proceedings. AP objects to the entire paragraph on the basis that Mr. Kelly is not qualified to express an opinion about Korean law. RMS responded that the evidence was admissible, not as expert opinion, but as a statement of his experience litigating in the foreign jurisdiction.

[108] I agree that Mr. Kelly's description of his experience litigating in the foreign jurisdiction is both relevant and admissible, with one exception. In my view, the final statement that "it also appears to me that discovery procedures in Korea are limited, as is a lawyer's ability to call all the witnesses that he or she wishes" trespasses into expert opinion, for which Mr. Kelly is not qualified. Accordingly, that phrase is struck from the affidavit.

Enforcement of an eventual judgement

[109] With respect to the enforcement of an eventual judgment, RMS acknowledges that a judgment obtained in British Columbia will have to be enforced in Korea. Although this factor favours AP's position, RMS's willingness to enforce a potential British Columbia judgment in Korea reduces the weight of this factor in this case. RMS, in choosing to litigate in this forum, has accepted whatever complications may exist to enforcement.

Fair and efficient working of the Canadian legal system

[110] With respect to the fair and efficient working of the Canadian legal system as a whole, RMS notes that in *Schwarzinger v. Bramwell*, 2011 BCSC 283, a case addressing whether British Columbia or Nicaragua was the most appropriate forum for the litigation, Justice Gray concluded that this factor is irrelevant because the other forum is not in Canada (at para. 101). I agree with RMS that this applies to the present litigation.

[111] In the result, I have concluded that AP has not demonstrated that there is another jurisdiction that enjoys a significant advantage to the forum that the plaintiff has selected. I conclude that this is not an appropriate case in which to exercise the court's discretion to decline jurisdiction.

Disposition

[112] In conclusion, I find that the British Columbia court has jurisdiction to this proceeding and that this Court should not decline jurisdiction in favour of the courts in Korea. I dismiss the application. If the parties are unable to agree with respect to the issue of costs, they are at liberty to apply with respect to that issue within 60 days of these reasons.

"Ross J."

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