

CANADA / JUDGMENT

# Thunderstruck Resources Ltd. v. Bonga Xploration Drilling Supplies Ltd.

2022 BCSC 404

COURT

Supreme Court of British Columbia

DECIDED

14 March 2022

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2022 BCSC 404 Thunderstruck Resources Ltd. v. Bonga Xploration Drilling Supplies Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thunderstruck Resources Ltd. v. Bonga Xploration Drilling Supplies Ltd.,

2022 BCSC 404

Date: 20220314

Docket: S213440

Registry: Vancouver

Between:

Thunderstruck Resources Ltd. and Bryce Bradley

Plaintiffs/Defendants by way of Counterclaim

And

Bonga Xploration Drilling Supplies Ltd., Lloyd Francis Gale and Vicky Namuyomba

Defendants

And

Thunderstruck Limited

Defendant by way of Counterclaim

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

(Hearing proceeded via MS Teams)

Counsel for the Plaintiffs:

J.V. Ensom

M. Lusk (A/S)

Counsel for the Defendants:

D.R. North

Place and Date of Hearing:

Vancouver, B.C.

January 11, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 14, 2022

## OVERVIEW

- [1] The plaintiffs, Thunderstruck Resources Ltd. ("Thunderstruck"), and Bryce Bradley, (collectively, the "Plaintiffs"), seek damages in this action against the defendants, Bonga Xploration Drilling Supplies Ltd. ("Bonga"), its principal, Lloyd Gale, and another employee, Vicky Namuyomba (collectively, the "Defendants"). The Plaintiffs advance various causes of action including defamation, breach of contract and unjust enrichment.
- [2] On this application, the Defendants seek:
- a) an order that this proceeding be dismissed on the ground that this Court does not have jurisdiction simpliciter (or territorial competence) over the Defendants in respect of the claims made against them, pursuant to the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA]; or,
  - b) in the alternative, an order staying this proceeding, on the basis that the Court ought to decline to exercise that jurisdiction, in favour of the courts of Fiji, pursuant to the CJPTA; and
  - c) costs of this application in the amount of \$5,000.
- [3] The Plaintiffs oppose the orders sought.

## BACKGROUND FACTS

- [4] Thunderstruck is a BC public company with corporate offices located in Vancouver, BC. It is in the business of mineral exploration, with various mining projects in Fiji. Thunderstruck's shares are widely held and listed on the Toronto Venture Exchange. It claims to have an important investor base located in BC and that this investor base represents a substantial source of capital for Thunderstruck's operations.
- [5] Ms. Bradley is Thunderstruck's Chief Executive Officer (CEO). She oversees Thunderstruck's ongoing mineral exploration operations in Fiji. Ms. Bradley is a Canadian citizen and ordinarily resident in BC, where she keeps her primary residence.
- [6] Thunderstruck does business in Fiji through a wholly-owned Fijian subsidiary, the Defendant by Counterclaim, Thunderstruck Limited ("FijiCo"). FijiCo is used primarily for local operational purposes within Fiji, such as hiring local employees. However, Thunderstruck's management, investor relations and all other significant functions--including entering into contracts with suppliers and contractors--are all conducted by Thunderstruck.
- [7] Bonga is also a BC company with its registered and records office in BC. Bonga is in the business of providing drilling services to exploration businesses. Mr. Gale is Bonga's CEO and its sole director. He is a Canadian citizen ordinarily resident in BC, where he maintains his primary residence with his spouse, Ms. Namuyomba. There is a dispute in the evidence as to whether Ms. Namuyomba is an employee of Bonga; Bonga says she is not. It is not disputed that Ms. Namuyomba lives, works and is ordinarily resident in BC.
- [8] On May 15, 2020, Thunderstruck and Bonga entered into the Thunderstruck Resources Exploration Project or Service Contract (the "Contract"), by which Bonga was to provide drilling and other services to Thunderstruck with respect to its Fijian projects (the "Services"). Bonga drafted the Contract. Under the Contract, Bonga was to provide its employees, materials, supplies and equipment to perform the Services. Bonga was required to follow all local Fiji laws while carrying out the work. All payments to Bonga under the Contract were made in Canadian Dollars to Bonga's Canadian bank account with Scotiabank.
- [9] Finally, and of some significance on this application, the Contract provided that it "shall be governed by and construed in accordance with the laws of BC".
- [10] In June 2020, Bonga arranged for the delivery of shipping containers of equipment to Fiji for the work under the Contract and Bonga also bought other equipment in Fiji (the "Bonga Equipment"). In August 2020, Mr. Gale arrived in Fiji to begin performing work under the Contract. Due to the COVID-19 pandemic, Bonga had difficulty bringing employees and contractors into Fiji. Accordingly, the parties agreed that Thunderstruck, through FijiCo, would hire local employees that Bonga would train and supervise.

- [11] In September and December 2020, Bonga commenced work at two of Thunderstruck's Fijian mines.
- [12] On January 11, 2021, Thunderstruck delivered a letter to Mr. Gale in Fiji terminating the Contract (the "Termination Letter"). There is a dispute between the parties as to whether the termination arose from various disputes leading up to the Termination Letter, or whether, as Mr. Gale says, this step was taken without Thunderstruck raising any issues to him.
- [13] Prior to the commencement of work by Bonga, Bonga received a pre-payment of 30% of the total expected work to be done. The purpose of the deposit was to enable Bonga to buy, maintain and/or repair the drilling equipment to be used under the Contract. The deposit was to be applied to invoices Bonga issued as drilling work was completed. At the time of the termination, Bonga had been paid a \$105,000 deposit, although Thunderstruck says that approximately \$96,250 of that amount had not been applied to an invoice at the time of the Termination Letter.
- [14] After the termination, Bonga did not provide any further Services under the Contract.
- [15] On January 13, 2021, Thunderstruck's Fijian counsel informed Bonga that Thunderstruck was asserting a lien over the Bonga Equipment until Bonga repaid the deposit amounts that had not been earned under the Contract.
- [16] Following termination of the Contract, the dispute between the parties escalated in respect of the Bonga Equipment, principally in Fiji.
- [17] In mid-January 2021, Mr. Gale sent emails and a letter to Thunderstruck concerning the disputes and threatening legal action against Thunderstruck in Canada. In those communications, Mr. Gale specifically referred to the Contract being governed by Canadian laws. However, Bonga did not file any action in Canada; rather, Bonga reported Thunderstruck and Ms. Bradley to the Fijian police, alleging theft by Thunderstruck of the Bonga Equipment. In February 2021, Bonga denied Thunderstruck's allegations under the Contract said to give rise to the termination and demanded damages as well as a return of the Bonga Equipment.
- [18] Thunderstruck alleges that Bonga, Mr. Gale and Ms. Namuyomba then made various Internet postings after the termination of the Contract on websites such as Stockwatch.com and CEO.ca to the effect that Thunderstruck had stolen the Bonga Equipment. Thunderstruck also became aware that Mr. Gale had sent emails to two Thunderstruck directors (one of whom is located in Vancouver), in which Mr. Gale alleged that Ms. Bradley was acting unethically and that she had engaged in "theft" of the Bonga Equipment.
- [19] Mr. Gale alleges that, following the termination of the Contract, he was unable to leave or that he was "stranded" in Fiji based on immigration issues initiated by Thunderstruck. Thunderstruck denies that Mr. Gale was "stranded" in Fiji as he alleges.

- [20] Finally, in March 2021, the parties' dispute led to the filing of various legal proceedings in Fiji:
- a) On March 1, 2021, Bonga issued a notice under Fijian law demanding payment of stand by charges of \$208,600 plus interest from FijiCo, failing which Bonga would seek to wind up FijiCo (the "First Statutory Demand");
  - b) On March 1, 2021, Bonga and Mr. Gale, as plaintiffs, issued an "Originating Summons" against Thunderstruck and FijiCo, as defendants, seeking an order that the Bonga Equipment be delivered up and an injunction preventing the defendants from using the Bonga Equipment (the "Injunction Proceeding"); and
  - c) On March 16, 2021, FijiCo responded to the First Statutory Demand by filing proceedings to set them aside. In particular, FijiCo challenged the right of Bonga to enforce the Contract against it on the basis that the Contract was between Bonga and Thunderstruck (not FijiCo) and that the Contract was governed by BC law.
- [21] The evidence is unclear whether FijiCo and/or Thunderstruck have responded to the Injunction Proceeding against them in Fiji.
- [22] Beginning in April 2021, the Fiji Courts shut down save for urgent matters due to the COVID-19 pandemic.
- [23] On April 7, 2021, Thunderstruck filed its Notice of Civil Claim (NOCC) in this proceeding (the "BC Action"). The claims advanced include:
- a) Breach of Contract: Thunderstruck seeks damages from Bonga for breach of the Contract. Thunderstruck also asserts a lien on the Bonga Equipment until payment was made;
  - b) Unjust Enrichment: Thunderstruck seeks restitution from Bonga for its unjust enrichment due to the deposit payment; and
  - c) Defamation: Thunderstruck and Ms. Bradley seek damages from Bonga, Mr. Gale and Ms. Namuyomba for defamation and libel, based on the Internet postings and later email communications concerning the "theft" of the Bonga Equipment.
- [24] Thunderstruck served the NOCC on Mr. Gale, who was still in Fiji at the time, claiming the right to serve him outside of BC. The basis for service outside of BC was said to arise given that the proceeding concerned contractual obligations and the contract is governed by BC law, that it concerned a tort committed in BC and there was a real and substantial connection between BC and the facts raised in the proceeding.
- [25] On April 29, 2021, Bonga, Mr. Gale and Ms. Namuyomba filed a jurisdictional response form in the BC Action disputing that the Court had jurisdiction, pursuant to the Supreme Court Civil Rules, R. 21-8(1).

- [26] On May 14, 2021, Ms. Namuyomba filed a Response to Civil Claim (generally referred to as an "RTCC" in the remainder of these reasons) denying all allegations (principally in respect of the alleged defamation and libel), and asserting her jurisdictional response. On May 18, 2021, Bonga and Mr. Gale filed their RTCC denying all allegations and asserting their jurisdictional response.
- [27] The filings of the RTCCs were made in light of the Plaintiffs' counsel's express agreement on May 10, 2021 that those filings would not be raised as constituting attornment so as to establish jurisdiction of this Court with respect to the BC Action.
- [28] However, on May 18, 2021, Bonga and Mr. Gale also filed a Counterclaim in this proceeding against Thunderstruck and Ms. Bradley and they also added FijiCo as a Defendant by Counterclaim. In the Counterclaim, Bonga and Mr. Gale "repeat and rely on the allegations and facts set out in the [RTCC]". They seek damages for fraudulent and negligent misrepresentation, breach of the Contract, unjust enrichment, a return of the Bonga Equipment or damages for conversion, aggravated and punitive damages, and various other claims.
- [29] Similar to Thunderstruck's claim to serve Mr. Gale outside of BC, Bonga and Mr. Gale claimed the right to serve FijiCo outside of BC on the basis that the proceeding concerned "a business carried on in [BC]; and/or the pleadings set out a real and substantial connection between [BC] and the facts on which the proceeding is based".
- [30] The "without prejudice" agreement between counsel concerning the RTCC filings did not include any filing of a counterclaim by the Defendants. As a result, on May 18, 2021, Plaintiffs' counsel put the Defendants' counsel on notice that the Counterclaim amounted to the Defendants' having submitted to the jurisdiction of this Court.
- [31] On May 31, 2021, the Defendants filed and served this application.
- [32] On July 9, 2021, Thunderstruck, Ms. Bradley and FijiCo filed their Response to Counterclaim.
- [33] On September 7, 2021, Mr. Gale returned to Canada from Fiji.
- [34] On September 9, 2021, Bonga served a second statutory demand on FijiCo in Fiji (the "Second Statutory Demand"). The factual basis and relief sought is substantially identical to the First Statutory Demand, save for referring to an increased claim (\$828,000CAD plus interest). In response, FijiCo applied to set the Second Statutory Demand aside.
- [35] On September 14, 2021, the parties exchanged lists of documents in this proceeding, without prejudice to the Defendants' position on this application.
- [36] In late September 2021, Fiji Courts reopened. Around that time, the Fijian action relating to the Second Statutory Demand (and the corresponding application to set it aside) were called before the Fiji Court for procedural directions. However, the matter did not proceed then.

- [37] On December 10, 2021, the Fiji Court set aside Bonga's First and Second Statutory Demands. In addition, the Fiji Court ordered that Bonga pay FijiCo's costs. Bonga has not paid these costs, as ordered.
- [38] On December 7, 2021, the only remaining proceeding in Fiji--the Injunction Proceeding--came before the Fiji Court. At that time, the Fiji Court was advised on the upcoming hearing in this Court by which the Defendants now contest this Court's jurisdiction to proceed with the BC Action. I was initially advised that the Fiji Court ordered the filing of written submissions as to whether the Fiji Court has jurisdiction to hear the Injunction Proceeding while a decision on this application is pending. I was more recently advised that a hearing for that matter has nonetheless been set for March 17, 2022. I have no further information about the status of the Injunction Proceeding.

## LAW AND ARGUMENT

- [39] The Defendants advance arguments toward establishing that this Court lacks territorial jurisdiction or alternatively, if jurisdiction exists, that this Court should decline to exercise it.

### A. Jurisdiction Simpliciter / Territorial Competence

- [40] The parties do not dispute the proper approach to the issue as to whether this Court has jurisdiction to resolve the disputes in this action.
- [41] Territorial competence (or jurisdiction simpliciter) is determined exclusively in accordance with the rules set out in the CJPTA: *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para. 18, leave to appeal ref'd [2010] 1 S.C.R. xvi (note) (S.C.C.).
- [42] Section 3 of the CJPTA provides a list of disjunctive conditions under which a court has territorial competence in a proceeding brought against a person. The last of these conditions under subsection (e) provides for territorial competence where there is a "real and substantial connection between [BC] and the facts on which the proceeding against that person is based". Section 10 provides an inclusive list of circumstances where a real and substantial connection is presumed to exist. To engage territorial competence under s. 3(e), and consequently under s. 10, the Plaintiffs bear the burden of proof of establishing that at least one of the connecting factors under s. 10 exists: *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 at paras. 16-17, leave to appeal ref'd [2020] S.C.C.A. No. 376. The pleaded facts, if they come under one of the connecting factors listed under s. 10, are assumed to establish a real and substantial connection required for a BC court to assume jurisdiction, subject to the Defendants' contesting those facts. In the event of a contest, the Plaintiffs need only establish the low burden of a "good arguable case": *Ewert* at para. 16.

- [43] The Defendants may still attempt to rebut the presumption by establishing facts that demonstrate that the connecting factor does not establish any real relationship between the subject matter of the dispute and BC or only a weak relationship: Ewert at para. 17.
- [44] The Plaintiffs allege that they have met the low threshold of establishing a good arguable case that this Court has territorial competence, on three separate grounds under s. 3 of the CJPTA:
- a) the Defendants attorned to the jurisdiction of this Court by voluntarily filing the Counterclaim (s. 3(b));
  - b) each of the Defendants is "ordinarily resident" in BC (s. 3(d)); and
  - c) there are real and substantial connections between this dispute and BC (s. 3(e)).

Section 3(b): Have Bonga and Mr. Gale Attorned to the Court's Jurisdiction?

- [45] A party may submit to a court's jurisdiction, or "attorn", if a party requests that a court make any decision on the merits, as opposed to taking a step to contest jurisdiction. At common law, attornment could occur by mistake, and by such simple actions as filing a pleading defending allegations or seeking general relief: *Litecubes, L.L.C. v. Northern Light Products, Inc.*, 2009 BCSC 181 at para. 40.
- [46] In *Litecubes*, Justice Griffin (as she then was) considered an application to enforce a US judgment. One of the issues was whether the defendant had attorned to the jurisdiction of the US Court due to its participation in those proceedings. Justice Griffin described the applicable law (under the predecessor to R. 21-8) as follows:
- [35] In *[Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd. (1996), 13 B.C.L.R. (3d) 41 (B.C.C.A.)]*, the British Columbia Court of Appeal held that appearing in the foreign court to challenge either jurisdiction simpliciter (territorial competence) or forum conveniens, or both, is not attornment, based on R. 14(6) the Rules of Court of the B.C. Supreme Court, which allowed such applications to be brought without submitting to the court's jurisdiction. However, any steps beyond that would be regarded as voluntary submission to the court's jurisdiction, as held by the Court at para. 15:

[T]he law in British Columbia today entitles a party to an action to dispute an order for service ex juris upon him of an originating proceeding, and to challenge jurisdiction, both simpliciter and forum conveniens, without the risk that bringing such applications will constitute acceptance by him of the jurisdiction of the court. Beyond that, the common law prevails such that unless an appearance before the court is made under duress, it will be regarded as voluntary.

[emphasis added]

- [36] The above passage has been described as resulting in an "entwining" of the common law on recognition of a foreign judgment with the Rules of Court: Elizabeth Edinger, "Disputing Jurisdiction, Attornment and Mid--Ohio" (Jan. 2009) 67 *The Advocate* 33 at 39.

[37] The Rules of Court have been amended since the Mid-Ohio decision, and now go further as to what steps a party may take in British Columbia without submitting to the jurisdiction of the court. Sub-Rule 14(6.4)(b)(ii) allows a party to defend on the merits without submitting to the jurisdiction of the court, if the party has brought a motion within 30 days after entering an appearance, challenging jurisdiction, and pending the court's decision on the application challenging jurisdiction. The Rules of Court thus grant a period of "attornment immunity" to parties in British Columbia proceedings who take certain steps in the proceeding while challenging jurisdiction.

[Emphasis in original.]

[47] In *Litecubes* at para. 42, this Court determined that the defendant had attorned since it had not simply defended the US proceedings; rather, the defendant had advanced a counterclaim and participated in the trial on the merits and only afterwards attempted to challenge jurisdiction.

[48] The current R. 21-8(5)(b)(ii) similarly permits a party to take certain steps to "defend the proceeding on its merits" without being considered as having attorned to the Court, pending the hearing of that party's notice of application.

[49] The Plaintiffs also point to *Coldmatic Refrigeration of Canada Ltd. v. PU.MA. s.r.l.* (1998), 21 C.P.C. (4th) 267 at para. 9. There, the Court found that the defendant did not avail itself of the established procedures to contest jurisdiction, but instead had filed a defence and counterclaim that amounted to attornment.

[50] The Plaintiffs also rely on *Cao v. Chen*, 2020 BCSC 735. At para. 82, Justice Forth held that, in the context of a family proceeding, the husband's filing of a counterclaim and his consent to a substantive order was sufficient to prove his attornment to the Court's jurisdiction pursuant to s. 3(b) of the CJPTA to establish territorial competence.

[51] Bonga and Mr. Gale argue that they have not attorned in this proceeding as long as they have included certain words in their pleading disputing this Court's jurisdiction. They rely on *Schwarzinger v. Bramwell*, 2011 BCSC 283.

[52] In my view, Bonga and Mr. Gale's argument is unpersuasive.

[53] As Justice Gray noted in *Schwarzinger*, the old R. 21-8 (R. 14) provides that a party may file a "pleading" and avoid attornment by stating in that pleading that it disputes jurisdiction. I acknowledge that the definition of a "pleading" in R. 1-1(1) includes a counterclaim; however, I find that the overall intent under R. 21-8 is that the pleading must be directed toward "defend[ing] the action on its merits". That is exactly what the party in *Schwarzinger* did in its statement of defence: paras. 31, 39. This is consistent with Gray J.'s comment in para. 40 that:

Rule 14(6.4) gives protection to defendants who file certain pleadings. It does not go on to require that they apply for an order that the court does not have jurisdiction.

[Emphasis added.]

[54] The addition of a counterclaim is not an alteration or amendment of the pleadings but is the addition of a new cause of action: *Cohen v. Kronfuss* (1980), 21 B.C.L.R. 390 at 391 (S.C.). In that vein, I see no basis upon which it can be said that the filing of this new cause of action in the proceeding (i.e., the Counterclaim) is consistent with defending the action on its merits. There is no provision in R. 21-8 that allows a party to advance a counterclaim without prejudicing the extant dispute regarding the Court's jurisdiction.

[55] Bonga and Mr. Gale also argue that they had "no choice" but to file the Counterclaim at the same time as their RTCC. They refer to R. 3-4(1):

A defendant in an action who wishes to pursue a claim within that action against the plaintiff must, within the time set out for the filing of a response to civil claim under Rule 3-3 (3), file a counterclaim in Form 3 that accords with Rule 3-7.

[Emphasis added.]

[56] Again, I am unable to accept this argument. I conclude that Bonga and Mr. Gale had other options under the Rules to address the potential attornment by the filing of the Counterclaim.

[57] Firstly, there is no explanation as to why Defendants' counsel did not seek the agreement of Plaintiffs' counsel to file the Counterclaim on a "without prejudice" basis, just as he did for the RTCC filings. Even assuming such an agreement was not forthcoming, Bonga and Mr. Gale had other means of addressing the matter.

[58] The Plaintiffs had the option of seeking directions from the Court, pursuant to R. 21-8(4)(c) as to the "conduct of the proceeding". Bonga and Mr. Gale's counsel was well aware of this option, since he had expressly suggested it to Plaintiffs' counsel in his May 4, 2021 email.

[59] Finally, Bonga and Mr. Gale could have awaited the outcome of its jurisdictional challenge. If it was unsuccessful, they could have applied for leave to late file the Counterclaim pursuant to R. 22-4(2). As recently stated in *Evans v. Dumitrean*, 2019 BCSC 203 at para. 50, the Court has discretion to extend the time for filing where it is "just and convenient".

[60] In summary, I find that the Plaintiffs have a good arguable case that the filing of the Counterclaim was a voluntary step taken by Bonga and Mr. Gale that has resulted in them attorning to the jurisdiction of this Court in respect of this dispute. As Plaintiffs' counsel also noted, attornment is also consistent with the Bonga and Mr. Gale expressly relying on this Court's jurisdiction to ground their right to serve FijiCo outside of BC "on the grounds that the proceeding concerns a business carried on in [BC]; and/or the pleadings set out a real and substantial connection between [BC] and the facts on which the proceeding is based".

Section 3(d): Are the Defendants Ordinarily Resident in BC?

- [61] Pursuant to s. 3(d) of the CJPTA, territorial competence is established over a person only if "that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding".
- [62] The test for whether a party is "ordinarily resident" is different for corporations than it is for natural persons.
- [63] Pursuant to s. 7 of the CJPTA, a corporation is "ordinarily resident" 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,
- [Emphasis added.]
- [64] Bonga admits in its RTCC (and Counterclaim) that it is a BC company with a registered and records office located in Smithers, BC. This is a "complete answer" to this question under the CJPTA in that Bonga is taken to be "ordinarily resident" in BC for the purposes of s. 3(d) of the CJPTA, such that territorial competence is established: *Conor Pacific Group Inc. v. Canada (Attorney General)*, 2012 BCCA 222 at para. 13.
- [65] There is no dispute that, when the NOCC was filed, Ms. Namuyomba was ordinary resident in BC. She acknowledges in her RTCC that she lives in Burnaby, BC.
- [66] The only real dispute arises with respect to Mr. Gale. He asserts that he was ordinarily resident in Fiji in April 2021 when the NOCC was filed.
- [67] *Broad v. Pavlis*, 2015 BCCA 20 provides guidance on the meaning of "ordinarily resident". At para. 38, the Court confirms that whether a person is ordinarily resident in a place is a question of fact. As to the meaning of the term, the Court stated:
22. The seminal authority on the meaning of "ordinarily resident" is the decision of the Supreme Court of Canada in *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209. In that case, four of five justices found Mr. Thomson was ordinarily resident in Canada for tax purposes, based on the time he spent and his "settled life" at a home in New Brunswick, while at the same time he kept a home in North Carolina in the United States.
24. The appellant relies on the definition of "ordinarily resident" articulated in *Thomson* by Justice Estey (at 231-232) that a person is ordinarily resident in:

the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates.

25. He also cites Justice Rand's statement (at 224):

The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

26. The chambers judge applied Justice Estey's definition of ordinary residence as adopted in *Blazek v. Blazek*, 2009 BCSC 1693 at paras. 31-35, where Madam Justice Gropper determined whether a person was ordinarily resident for the purpose of s. 3(d) of the CJPTA. Madam Justice Gropper applied a broad and liberal interpretation to the concept of ordinary residence, noting that Estey J. said, in addition to the statement quoted above: "It is well established that a person may have more than one residence", and that it is not a matter of counting the days spent in the jurisdiction (at 232).

27. The respondent supports the chambers judge's decision factually by filing an application to adduce fresh evidence, and legally by citing the recent decision in *Knowles v. Lindstrom*, 2014 ONCA 116, where the Ontario Court of Appeal found, also relying on the principle articulated in *Thomson* that a person can be ordinarily resident in more than one place, that Ontario had jurisdiction in family law proceedings for a couple that lived in both Florida and Ontario.

[68] In *Parker v. Mitchel*, 2016 BCSC 723 at paras. 18-20, the Court applied *Broad* and the authorities referred to in *Broad* in considering whether the respondent was "ordinarily resident" in BC, in addition to his residency in California. At para. 24, Justice Smith found that the respondent's "settled routine" of his life included regular and normal periods of residence in BC that went beyond more than a casual or intermittent visitor. The respondent was found to be ordinarily resident in BC.

[69] I find that the evidence establishes that, in April 2021, Mr. Gale was "ordinarily resident" in BC, based on the following:

- a) Mr. Gale acknowledges in his RTCC that he is a "Canadian citizen and is domiciled in [BC]";
- b) In his RTCC (filed in May 2021), Mr. Gale asserts only that he is "currently" residing in Fiji;
- c) The only reason Mr. Gale was originally residing in Fiji was for the purpose of conducting drilling work for Thunderstruck, which ceased in January 2021;

- d) By his own evidence, the only reason Mr. Gale continued to temporarily stay in Fiji was that he was prevented from leaving the country by reason of immigration issues and that he wished to stay so as to obtain the return of the Bonga Equipment. In his Affidavit, Mr. Gale refers to being "stranded" in Fiji and that he cannot return to Canada, as he wished to do so, save for the immigration issues;
  - e) The temporary, unusual and allegedly coerced nature of Mr. Gale's stay in Fiji in spring 2021 is evidenced by his immediate return to BC. Mr. Gale states that he was able to return to Canada when Fiji immigration officials determined that he had to leave due to him not having a visa extension; and
  - f) The inescapable inference is that, but for this alleged immigration issue in Fiji, Mr. Gale would have returned to the "settled routine of his life at the place he regularly, normally or customarily lives", namely his residence in Burnaby with Ms. Namuyomba.
- [70] I find that the Plaintiffs have a good arguable case that all of the Defendants are "ordinarily resident" in BC for the purpose of s. 3(d) of the CJPTA.

Section 3(e): Is there a Real and Substantial Connection with BC?

- [71] With respect to determining whether there is a "real and substantial connection" pursuant to s. 3(e), s. 10 of the CJPTA provides a list of circumstances where a real and substantial connection is presumed to exist. The relevant factors here are:
- (e) concerns contractual obligations, and
  - (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, [or]
  - (g) concerns a tort committed in British Columbia; ...
  - (i) Breach of Contract Claim
- [72] The provisions of the Contract are clear in that it is governed by the laws of BC. The Defendants attempt to disregard this factor by referring to the fact that, under the Contract, Bonga was to abide by local Fijian law in respect of the provision of the Services.
- [73] In my view, the Defendants' position is without merit. The Contract is clear that BC law is to apply with respect to any contract issues that may arise. The fact that performance of some or all elements of the Services are to conform with Fijian law does not detract from this factor. A failure to abide by Fijian law in some respect would simply stand as a failure to perform as required by the Contract, in accordance with BC law.
- [74] Accordingly, I find that a real and substantial connection between the Thunderstruck's breach of contract claim and BC has been established under s. 10(e)(ii) of the CJPTA.

(ii) Unjust Enrichment Claim

- [75] With respect to the unjust enrichment claim against Bonga, the Plaintiffs rely on the presumptive connecting factor that the claim concerns "restitutionary obligations that, to a substantial extent, arose in British Columbia": CJPTA, s. 10(f).
- [76] The Plaintiffs' pleading with respect to unjust enrichment is:
13. In addition, Thunderstruck made advance payments to Bonga to be applied towards the cost of future drilling pursuant to the Services Agreement (the "Advance Payments"). At the time of its termination Bonga has been paid Advance Payments in excess of the actual work it had conducted to date.
14. Bonga's retention of the Advance Payments in excess of the work actually completed is an unjust enrichment.
- [77] In addition, the Plaintiffs refer to additional facts with respect to its unjust enrichment claim: (1) the Advance Payments were made under the Contract, a contract made in BC and subject to BC law; and (2) all payments to Bonga under the Contract (including the "Advance Payments") were made in Canadian dollars to Bonga's Canadian bank account with Scotiabank.
- [78] The Defendants argue that the unjust enrichment issues point to Fiji since they "stem" from the alleged breaches of the Contract taking place there. In my view, this underlying issue, which simply informs the unjust enrichment claim, does not detract from the fact that any overpayment by Thunderstruck was made in accordance with the Contract and any overpayment arises from monies advanced by Thunderstruck to Bonga here in BC.
- [79] Accordingly, I find that a real and substantial connection between the Thunderstruck's unjust enrichment claim and BC has been established under s. 10(f) of the CJPTA.
- [80] In the alternative, I accept Thunderstruck's argument that its unjust enrichment claim is closely related or connected to its breach of contract claim. In these circumstances, accepting that jurisdiction has been established with respect to the breach of contract claim, it would be incompatible with the notion of fairness and efficiency to require Thunderstruck to litigate these claims against Bonga separately: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 99.

(iii) Defamation Claim

- [81] With respect to the defamation claim, the Plaintiffs rely on the presumptive connecting factor that it concerns "a tort committed in [BC]": CJPTA, s. 10(g).
- [82] In *Club Resorts*, the Court considered which presumptive connecting factors would entitle a court to assume jurisdiction in a case involving a tort:

[90] To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, prima facie, entitle a court to assume jurisdiction over a dispute:

- (a) the defendant is domiciled or resident in the province;
- (b) the defendant carries on business in the province;
- (c) the tort was committed in the province; and
- (d) a contract connected with the dispute was made in the province.

[83] Here, factors (a), (b) and (d) are satisfied: the Defendants are resident in BC, Bonga carries on business in BC and the Contract is connected to the dispute that led to the alleged defamation.

[84] Factor (c)--where the tort was committed--was considered by the Court in *Breedon v. Black*, 2012 SCC 19. The issue concerned where the tort of defamation had taken place where certain statements were issued and Internet postings were made on a website that were alleged to be defamatory. Those statements and postings had been downloaded, read and republished in Ontario by three newspapers. The appellants argued that the Ontario Court should not assume jurisdiction because the actions were essentially American in substance or, alternatively, the Illinois Court was a more appropriate forum.

[85] On the issue of jurisdiction simpliciter, Justice LeBel, for the Court, stated:

20. The issue of the assumption of jurisdiction is easily resolved in this case based on a presumptive connecting factor -- the alleged commission of the tort of defamation in Ontario. It is well established in Canadian law that the tort of defamation occurs upon publication of a defamatory statement to a third party. In this case, publication occurred when the impugned statements were read, downloaded and republished in Ontario by three newspapers. .

[86] In *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, the Court addressed the issue where a book published in Quebec was alleged to be defamatory. The plaintiff sued in Ontario where the book had been distributed. On the issue as to where there was a real and substantial connection to Ontario, the Court stated:

[38] Here, the alleged tort of defamation occurred in Ontario. *Noir Canada* was distributed in Ontario. At this stage of the proceedings, the plaintiff need not show evidence of harm or that the book was read. The plaintiff need only allege publication and its allegations should be accepted as pleaded unless contradicted by evidence adduced by the defendants. For the purposes of proving defamation, publication may be inferred when the libellous material is contained in a book that is circulated in a library; the new evidence adduced by Banro on consent establishes that 15 copies of *Noir Canada* were circulated in Ontario libraries and one copy was checked out. In addition, Banro adduced evidence establishing that its reputation in Ontario is vital to conducting business, attracting investors and maintaining good relations with regulators such as the Ontario Securities Commission.

- [87] Finally, in Club Resorts, the Court also addressed the use of tort damage sustained as a connecting factor. As to defamation specifically, the Court stated:
- [89] The use of damage sustained as a connecting factor may raise difficult issues. For torts like defamation, sustaining damage completes the commission of the tort and often tends to locate the tort in the jurisdiction where the damage is sustained. In other cases, the situation is less clear.
- [88] The Plaintiffs have pleaded facts in their NOCC that locate the publication of the alleged defamatory statements in BC and that damage was sustained by them in BC:
19. Following Thunderstruck's termination of the Services Contract and imposition of the Lien, the Bonga Defendants embarked on a campaign to defame Thunderstruck and Bradley personally. The defamatory statements were directed primarily to the Thunderstruck investor community in North America, including in British Columbia, as well as Thunderstruck's joint venture partner, JOGMEC.
22. Each of the Defamatory Statements is false and tends to lower the reputation of the Plaintiffs in their community in the estimation of reasonable persons.
- [89] In addition, the Plaintiffs rely on Ms. Bradley's evidence that:
- a) Thunderstruck and Ms. Bradley rely on their good reputation in BC in order to attract investors to Thunderstruck, which is necessary to support its business;
  - b) The Defendants posted defamatory statements to Stockwatch.com, a popular source of real-time news for companies listed on major North American stock markets, where they were read and republished by at least one self-identified "Canadian investor";
  - c) The Defendants posted defamatory statements to CEO.ca, a Vancouver-based stock market dashboard and online forum for investors. CEO.ca is widely-used in the Vancouver-based mineral exploration investor community; and
  - d) Mr. Gale sent emails to two Thunderstruck directors, which included the alleged defamatory statements. One of the directors is located in Vancouver.
- [90] These allegations in the NOCC and in Ms. Bradley's evidence are sufficient to establish that the defamatory statements were published in BC and that the Plaintiffs suffered damage as a result in BC.
- [91] The Defendants have not submitted any evidence to contradict the allegations in the Plaintiffs' NOCC and Ms. Bradley's evidence concerning the location of the alleged tort of defamation. In his affidavit, Mr. Gale makes no mention of it. In their RTCCs, the Defendants deny having made any defamatory statements; alternatively, if such statements were made, the Defendants say that they were true or were honestly held beliefs.

[92] Accordingly, I find that the Defendants have failed to meet their burden to rebut the Club Resorts factors in respect of the defamation claim established by the Plaintiffs. I find that a real and substantial connection between the Thunderstruck's defamatory claim and BC has been established under s. 10(g) of the CJPTA.

## Summary

[93] In conclusion, I find that this Court has territorial competence or jurisdiction simpliciter with respect to the claims advanced by the Plaintiffs in the NOCC.

## B. Forum Non Conveniens

[94] Having established that this Court has jurisdiction simpliciter to address the dispute between the parties, the question now turns to whether this Court should accept jurisdiction.

[95] Pursuant to s. 11(1) of the CJPTA, BC courts have discretion to decline jurisdiction on the basis that another court is the more appropriate forum to hear the proceeding. Here, the Defendants argue that Fiji is the more appropriate forum to address the disputes between the parties.

[96] With respect to forum non conveniens, assuming this Court has jurisdiction simpliciter, the Plaintiffs are presumptively entitled to their choice of forum (here, BC): *JTG Management Services Ltd. v. Bank of Nanking Co.*, 2015 BCCA 200 at para. 46, cited with approval in *Hydro Aluminum Rolled Products GmbH v. MFC Bancorp Ltd.*, 2020 BCCA 295 at para. 27.

[97] The Defendants bear a heavy burden to displace that presumption, in that they must prove that the courts of Fiji are a "clearly more appropriate forum" such that this Court should decline to exercise jurisdiction: *Breeden* at para. 23. As stated in *Breeden*:

[37] In the end, some of the factors relevant to the forum non conveniens analysis favour the Illinois court, while others favour the Ontario court. The forum non conveniens analysis does not require that all the factors point to a single forum or involve a simple numerical tallying up of the relevant factors. However, it does require that one forum ultimately emerge as clearly more appropriate. The party raising forum non conveniens has the burden of showing that his or her forum is clearly more appropriate.

[Emphasis in original.]

[98] Under s. 11(2) of the CJPTA, BC courts must consider certain circumstances relevant to the issue. The list of circumstances is non-exhaustive and what circumstances apply will vary in different contexts. In addition, the weight to be assigned to any one or more factors will be case specific: *Club Resorts* at paras. 105 and 110; *Purple Echo Productions Inc. v. KCTS Television*, 2008 BCCA 85 at para. 59.

[99] Section 11(2) of the CJPTA provides:

- (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.

[100] I will address each of the above circumstances in turn.

### **Comparative convenience / expense for parties and witnesses**

- [101] With respect to this issue, the relevant common law factors include where each party resides, where each party carries on business, the convenience or inconvenience of witnesses and the costs of conducting the litigation in this jurisdiction: *Rotor Maxx Support Limited v. Air Palace Co. Ltd.*, 2020 BCSC 1321 at para. 64.
- [102] The evidence has conclusively established that Thunderstruck and Bonga carry on business in BC and do business here. Ms. Bradley, Mr. Gale and Ms. Namuyomba are all likely witnesses at a trial and all have established residences here in BC.
- [103] The Defendants assert that the evidence and witnesses to the performance on the Contract are "all" in Fiji, although that statement was made prior to Mr. Gale's return to BC. They also rely on the assertion that the corporate parties already have Fijian counsel in place given the proceedings already taken there.
- [104] I accept that some witnesses who reside in Fiji will likely need to be called.
- [105] On the other hand, Ms. Bradley has identified three witnesses located in the Vancouver area who had dealings with the Defendants under the Contract. In addition, I expect that witnesses from the Vancouver area will be called at trial in respect of the defamation claim, including Ms. Namuyomba, who is located in Burnaby, as is Mr. Gale now.
- [106] It is apparent that some travel of witnesses--with ensuing costs--will be required, no matter which jurisdiction ultimately hears the matter. If the matter is heard in BC, our courts have substantial technology to accommodate video evidence from any witness in the world as long as they have access to an internet connection. I have no information that the Fiji Courts have this technology.

[107] I conclude that this factor supports BC as the more appropriate forum, or at worst, is a neutral factor insufficient to displace the Plaintiffs' choice of forum.

### **Law to be applied to issues in the proceeding**

[108] It is common ground that the Contract, and therefore, Thunderstruck's breach of contract claim, is governed by BC law. Arguably, the same can be said in respect of the Plaintiffs' unjust enrichment and defamation claims.

[109] The Defendants argue that the parties agreed to the application of Fijian law in performance of the Contract, which would make Fijian law relevant to the proceedings and would "create a burden on the BC courts requiring expert evidence". Section V (Conduct of Operations) of the Contract provides in sub-section G (Community Relations) that Bonga will:

comply fully with applicable laws, ordinances, orders, and regulations as well as local community standards and practices.

[110] The Defendants concede that, practically speaking, the resolution of the dispute will involve a consideration by one jurisdiction of the applicable law from another jurisdiction.

[111] I agree that, if the matter is heard in BC, evidence will likely be necessary to prove Fijian law as it may be relevant to the performance or breach of the Contract. In addition, Fijian law may be relevant in respect of Thunderstruck's claim of lien with respect to the Bonga Equipment, although the parties disagree on that point. Thunderstruck says BC law applies.

[112] Having said that, this Court is not unfamiliar with receiving expert evidence as to foreign laws. Again, if evidence from an expert in Fijian law wishes to give evidence, that evidence can be introduced by a report and, if necessary, by that witness appearing by video to give his or her evidence in a BC courtroom.

[113] In any event, I would not characterize these "Fijian law" issues as overwhelming the overall legal issues that arise between the parties, including the unjust enrichment and defamation claims.

[114] The Defendants also argue that it will be necessary for the Court to grant orders to resolve the matter of the possession of the Bonga Equipment. They assert that these are not orders that this Court can make, even assuming they are enforceable in Fiji. I disagree. This Court can grant orders requiring that the parties to this proceeding to take certain actions. While those orders are not enforceable as in rem orders in Fiji, that is to say not enforceable in respect of the property located there, this Court would have in personam jurisdiction over the parties toward enforcing compliance with any orders granted.

[115] I conclude that this factor supports BC as the more appropriate forum, or at worst, is a neutral factor insufficient to displace the Plaintiffs' choice of forum.

Desirability of avoiding multiplicity of legal proceedings / conflicting decisions in different courts

[116] Where there are parallel proceedings in another jurisdiction concerning the same cause of action or set of facts, the court may exercise its discretion to decline jurisdiction in favour of the other jurisdiction to avoid potentially conflicting judgments: *Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Incorporated*, 2014 BCSC 752 at para. 54.

[117] The parties agree that the test to assess the circumstance, where one party asserts the existence of a parallel proceeding, is found in *Westec Aerospace Inc. v. Raytheon Aircraft Co.*, 1999 BCCA 243 at para. 25, aff'd 2001 SCC 26 and as recently cited in *Colonial Countertops* at para. 57:

- (1) Are there parallel proceedings underway in another jurisdiction?
- (2) If so, is the other jurisdiction an appropriate forum for the resolution of the dispute?
- (3) Assuming there are parallel proceedings in another appropriate forum, has the plaintiff established objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the British Columbia action that is of such importance that it would cause injustice to him to deprive him of it?

[118] In *Colonial Countertops* at para. 59, citing *Westec*, Justice Punnett described "parallel proceedings" as "litigation between the same parties about the same subject matter" which "raise the possibility of inconsistent or conflicting judgments being given".

[119] The Defendants assert that there are parallel proceedings in Fiji based on the Injunction Proceeding, wherein Bonga and Mr. Gale seek an order that the Bonga Equipment be delivered up and an injunction preventing the defendants from using the Bonga Equipment be issued.

[120] The Plaintiffs disagree that the BC Action is a "parallel proceeding" to the Injunction Proceeding. They say that the BC Action is not between the same parties, nor about the same subject-matter. Thunderstruck and Ms. Bradley seek damages from Bonga, Mr. Gale and Ms. Namuyomba for defamation, breach of contract and unjust enrichment. In Fiji, there have been a total of three proceedings:

- a) The matter of the First and Second Statutory Demands brought by Bonga against FijiCo which are no longer relevant as they have been set aside; and
- b) The Injunction Proceeding, by which Bonga and Gale seek orders for the return of the Bonga Equipment from Thunderstruck and FijiCo and an injunction preventing use of the Bonga Equipment until that happens.

- [121] The Plaintiffs say that they have not attorned to the jurisdiction of the Fiji Court. They intend to seek a stay or dismissal of the Fiji legal proceedings on jurisdictional grounds. The Plaintiffs' position is that Fiji Court lacks jurisdiction over Thunderstruck, a BC public company, and should decline jurisdiction over Bonga's claims that overlap with the Defendants' Counterclaim that has been brought before this Court.
- [122] The Fiji Court had deferred a hearing on the jurisdiction issue until this Court has decided this application, but as stated above, I have recently been informed by counsel that the Fiji Court has ceased continuing to defer the hearing of the Injunction Proceeding and that a hearing has been set for March 17, 2022.
- [123] It is incorrect for the Defendants to assert, as they do, that it was the Plaintiffs who created the parallel proceedings by this action so as to "circumvent" the Injunction Proceeding. First, the alleged "parallel" nature of the proceedings only arises from one part of Bonga and Mr. Gale's Counterclaim where they seek a return of the Bonga Equipment. Second, it was Bonga and Mr. Gale themselves who created this potential conflict by seeking relief from this Court which they now say is duplicative of a proceeding they had already commenced in Fiji. Third, the potential "parallel" proceeding now raised by them in BC substantially expands the relief sought in relation to the Bonga Equipment, in that they also now seek loss and damages.
- [124] I agree with the Plaintiffs that it would be manifestly unjust to allow Bonga and Mr. Gale to create a conflict or potential conflict by bringing parallel proceedings and to raise that as a factor in support of their argument that this Court should decline jurisdiction on all matters in dispute between the parties in favour of the Fiji Court.
- [125] In the overall context, I consider that a resolution of all of the issues in this action in BC, including those related to the Bonga Equipment, would serve as the most efficient and fair manner to resolve the issues. The Fiji proceedings appear to be not well advanced, particularly given the delays from the pandemic and the remaining unresolved jurisdictional challenges by Thunderstruck. In addition, given the advanced state of the pleadings here and the exchange of documentation between the parties, there has been an expenditure of considerable time and expense toward advancing these proceedings, all of which stand in favour of allowing this action to continue: see *Pacific Industrial Systems Inc. v. Pacific Separator Manufacturing Inc.*, [1993] B.C.J. No. 503:

However, there does appear to be certain advantages with the Colorado proceedings carrying on, with the corresponding stay of the British Columbia proceedings. Those advantages appear to be the state of development of the Colorado proceedings with reference to its trial date in June of 1993 and the extensive time and effort that has been involved by virtue of court proceedings and pre-trial depositions. In that context, in my view, the court is entitled to take into consideration costs that have been expended in Colorado in those proceedings. I also take into consideration that the plaintiff in these proceedings is actively counterclaiming in the Colorado proceedings and that a resolution of those Colorado proceedings will encompass a resolution of the issues

outstanding between the plaintiff and the defendant in these proceedings as well as, of course, covering outstanding matters in the Colorado litigation that might not involve the plaintiff in these proceedings.

[Emphasis added.]

[126] Finally, the Plaintiffs argue, with some force, that requiring them to pursue a defamation claim in Fiji would deprive them of significant personal or juridical advantages. They point to the further delay and expense of starting all over again in Fiji in respect of claims that far expand upon the narrow one that is already before the Fiji Court. In addition, they emphasize the importance of advancing their defamation claim as soon as practicable in BC as the locality where Thunderstruck and Ms. Bradley's reputation is enjoyed, citing Breeden at para. 36.

[127] I agree that the Plaintiffs' concerns, as above, are legitimate factors to consider. The Defendants do not claim any loss or advantage if they are required to proceed in BC.

[128] At the end of the day, this is but one factor in the overall analysis: Teck Cominco Metals Ltd. v. Lloyd's Underwriters, 2009 SCC 11 at paras. 25 and 38. In my view, any potential conflict can be laid at the feet of Bonga and Mr. Gale.

[129] I conclude that this factor supports BC as the more appropriate forum, or at worst, is a neutral factor insufficient to displace the Plaintiffs' choice of forum.

### **Enforcement of an eventual judgment**

[130] The Defendants argue that there is a risk that a Canadian judgment arising from the Counterclaim, as it relates to the Bonga Equipment (i.e., property in Fiji) may not be enforceable in Fiji.

[131] I reject this argument for the same reason stated above in relation to the law to be applied (the second s. 11(2) factor). This Court can grant orders requiring that the parties to this proceeding take certain actions. While those orders are not in rem enforceable in Fiji, this Court would have in personam jurisdiction over the parties toward enforcing compliance with any orders granted.

[132] I conclude that this factor supports BC as the more appropriate forum.

Fair and efficient working of the Canadian legal system

[133] The parties agree that this factor is not applicable.

## Summary

[134] In my view, the Defendants have failed to meet their burden to show that Fiji is clearly the more appropriate forum to decide all of the issues in this proceeding. To the contrary, the overall circumstances clearly support allowing the BC Action to continue. I will not decline to exercise this Court's jurisdiction under s. 11(1) of the CJPTA.

## CONCLUSION

[135] This application is dismissed. Costs are awarded in favour of the Plaintiffs against the Defendants on the usual Scale and in any event of the cause.

"Fitzpatrick J."

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