
CANADA / JUDGMENT

Viroforce Systems Inc. v. R&D Capital Inc.

2009 BCSC 1150

COURT

Supreme Court of British Columbia

DECIDED

25 August 2009

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2009 BCSC 1150 Viroforce Systems Inc. v. R&D Capital Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Viroforce Systems Inc. v. R&D Capital Inc.,

2009 BCSC 1150

Date: 20090825

Docket: 81894

Registry: Kelowna

Between:

Viroforce Systems Inc. and Nigel Boast

Plaintiffs

And

R & D Capital Inc.

Defendant

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Nigel Boast appeared for Viroforce Systems Inc. and on his own behalf

Counsel for the Defendant:

E.A. Cooke

Place and Date of Hearing:

Kelowna, B.C.

August 5, 2009

Place and Date of Judgment:

Kelowna, B.C.

August 25, 2009

- [1] The defendant, R & D Capital Inc. ("R&D") seeks an order declaring that this court has no jurisdiction over this proceeding or alternatively this court decline jurisdiction, and an order staying the proceeding and costs of this application.
- [2] This application is made pursuant to ss. 14(6), 14(6.1), 14(6.2), 14(6.3), 19(24), 44, 51A, 57 of the Rules of Court and s. 8(2) of the Law and Equity Act, R.S.B.C. 1996, c. 253 and the inherent jurisdiction of the court.
- [3] This application is opposed by the plaintiffs, Viroforce Systems Inc. ("Viroforce") and Nigel Boast.

BACKGROUND

- [4] Viroforce is a private British Columbia company which "has researched and developed a novel, patent pending gas disinfection technology for application in the healthcare, defence, disaster clean up, and other industry sectors." (paragraph 4 of Nigel Boast's affidavit #1).
- [5] R&D is a Quebec corporation which provides financing to technology and scientific research companies. The financing is short term and in advance of the borrower receiving its tax credits from the Canadian Federal Government's Federal and Provincial Government's Scientific Research and Experimental Development Program ("SR&ED").
- [6] Viroforce sought such financing from R&D and entered into an agreement described as a Term Loan Agreement dated February 27, 2008. (the "TLA"). Mr. Boast entered into a Suretyship Agreement (the "Suretyship") bearing the same date which guaranteed \$40,000.00 of Viroforce's obligation of the TLA. In addition, Viroforce granted a general security agreement to R&D, securing all assets of Viroforce, including SR&ED tax credits. This general security agreement was subject to a general security agreement in favour of the Business Development Bank of Canada ("BDBC") from whom Viroforce had borrowed money. However, BDBC's general security agreement did not secure the tax credits of SR&ED. Viroforce is current with its payment to BDBC and in compliance with all the terms and conditions of their agreement.
- [7] Viroforce commenced this proceeding on February 6, 2009, amending its writ on March 18, 2009. In summary, it seeks a declaratory order as to the amount of interest and capital due R&D, and any other amount due to it under the TLA and costs. R&D filed an appearance and statement of defence; the latter on May 12, 2009. It alleges, amongst other matters, that the

courts of the province of Quebec have exclusive jurisdiction over all disputes between R&D pursuant to the TLA. The notice of motion which is now before the court was filed May 11, 2009. Viroforce insisted that R&D file a statement of defence and if it did not, steps in default would be taken in the proceeding.

- [8] Viroforce has paid various amounts of money to R&D. A dispute has developed between Viroforce and R&D as to the crediting of these loan payments as between capital and interest and the amounts actually paid pursuant to the TLA. Viroforce alleges that the TLA charges a criminal rate of interest.
- [9] In May of 2009, R&D commenced an action in Quebec for the repayment of their loan pursuant to the terms of the TLA. Viroforce and Mr. Boast were served with these proceedings on the day this application was heard.
- [10] The TLA was signed by Viroforce and R&D on the same date by counterpart.

POSITIONS

- [11] R&D argues that it has not attorned to the jurisdiction of British Columbia. This is not disputed by Viroforce.
- [12] R&D argues the clauses 7.7 and 7.8 of the TLA provide that the TLA would be governed, construed and interpreted in accordance with the laws of Quebec and the courts of Quebec would have exclusive jurisdiction of all matters arising out of or in connection with the TLA. Further, any such claims arising out of the TLA are brought in the judicial district of Montreal, Quebec.
- [13] R&D argues the Suretyship has similar if not the same clauses as the TLA.
- [14] R&D writes in its written submission, "Ignoring the clear and unambiguous language of the TLA and the Suretyship", Viroforce should have commenced this action in the Province of Quebec.
- [15] Viroforce and Mr. Boast argue that R&D does business in British Columbia and Quebec as stated on their web site. Further, R&D advanced the money to Viroforce in British Columbia.
- [16] Viroforce argues that BDBC's general security agreement explicitly excluded the SR&ED credit, permitting R&D to have it as security for their loan. Both the loan agreement and the general security agreement with BDBC are governed by the laws of British Columbia.
- [17] Viroforce submits that it was vulnerable without revenues when they sought the loan from R&D and they did not seek independent legal advice before entering the TLA.
- [18] Viroforce and Mr. Boast further argue that the law in Quebec prevents Viroforce and Mr. Boast from appearing before the Quebec courts without representation by counsel.

- [19] Viroforce alleges that R&D charged it a criminal rate of interest in the TLA. Since the Criminal Code governs all provinces in Canada, which includes Quebec and British Columbia, the law governing this determination is the same.
- [20] Lastly, both Viroforce and Mr. Boast are resident in British Columbia where their respective assets are located.

THE LAW

- [21] There is no dispute that the issues raised in R&D's motion is not properly before the court.
- [22] There are two tests to consider in determining whether a Court in British Columbia has jurisdiction or can assume jurisdiction. One is jurisdiction simpliciter and the other is forum conveniens. Mr. Justice Gibbs in *Canadian International Marketing Distributing Limited v. Nitsuko Ltd.*, (8 March 1990), Vancouver Registry CA010730/CA010763 (C.A.) describes the court's approach to jurisdiction simpliciter and forum conveniens as:

The two forms of relief require sequential consideration in the sense that it is only if there is a finding of jurisdiction that it is necessary to apply the forum conveniens tests so as to decide whether jurisdiction should or should not be declined.

...

If the chambers judge had kept the two concepts of jurisdiction simpliciter, and forum conveniens separate, and followed the sequence of considering jurisdiction first, he would, I think, have disposed of the applications differently. On the facts the only connection between this case and the Province of British Columbia is that the plaintiff is a resident here, and that is not enough. The defendants are not residents. They are residents of Japan. They neither carry on business in Canada or have assets in Canada or have officers, employees or agents in Canada. In short, they have no presence here. Furthermore, the alleged cause of action arose outside of Canada. It arose on an alleged breach of a contract to deliver goods f.o.b. Japan, a contract moreover which appears to have incorporated the law of Japan to govern the contractual relationship.

- [23] Section 3 of the Court Jurisdiction and Proceeding Transfer Act, S.B.C., c. 28, ("CJPT") establishes the circumstances in which a court in British Columbia has jurisdiction simpliciter in a proceeding. Section 10 of the CJPT sets out factors that create presumptions of a "real and substantial connection" to be considered in s. 3(e) of the CJPT.
- [24] Mr. Justice Rice in *Iskander and Sons, Inc. v. Haghighat*, 2007 BCSC 753, referred to the meaning of "real and substantial connection" in s. 3(e) of the CJPT as discussed by Cumming J.A. in *Jordan v. Schatz* (2000), 77B.C.L.R. (3d) 134, 2000 BCCA 409 as:

What constitutes a "real and substantial connection" has not been fully defined. However, it has been well established by this Court in *Nitsuko*, [*Canadian International Marketing Distributing Ltd. v. Nitsuko Ltd.* (1990), 56 B.C.L.R. (2d) 130 (C.A.)], and in *Ell*, [*Ell v. Con-Pro Industries Ltd.* (1992), 11 B.C.A.C. 174 (C.A.)], that there is no real and substantial connection to British Columbia

based on the bare residency of the Plaintiff in the jurisdiction. There must be some other or further sufficient connecting factor or "contacts" to this province. Clear examples of connecting factors include the residency of the defendant in the jurisdiction or the fact that the tortious act was committed or damages suffered here.

[my emphasis]

[25] Should the court find jurisdiction simpliciter, the court then considers forum conveniens. Section 11 of the CJPT is a complete codification of forum conveniens. (*Borgstrom v Korean Air Air Lines Co., Ltd.*, 2007, BCSC 947). Section 11(2) of the CJPT sets out a broad range of criteria that a court must consider when exercising its discretion whether to decline or assume jurisdiction.

DISCUSSION

[26] R&D has taken the proper steps to bring the matter of jurisdiction before the court for its adjudication. This is not disputed by Viroforce.

[27] Viroforce argued that R&D did not bring to its attention that the TLA had a forum selection clause and that Viroforce did not obtain legal advice before entering into the TLA. At the same time Mr. Boast in his submission stated that he and Viroforce were not seeking rescission of the TLA. No such claim is pursued in Viroforce's statement of claim. R&D demonstrated that Viroforce engaged counsel for limited purposes relating to the TLA, but not for purposes of negotiating and reviewing the financing documents.

[28] Whether Viroforce can appear before the court in Quebec without counsel has not been properly proven. Viroforce attaches to Nigel Boast's affidavit #9 an excerpt from the Code of Civil procedure. That is not sufficient. There is no evidence before me as to the law in Quebec as to self-represented companies and persons appearing before the Quebec courts.

JURISDICTION SIMPLICITER

[29] In s. 3 of the CJPT,

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

(a) that the person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,

[30] R&D is not the plaintiff in another proceeding in the court to which Viroforce's action is a counterclaim.

(b) during the course of the proceeding that person submits to the court's jurisdiction,

[31] R&D has not submitted to the jurisdiction of this court.

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,

[32] There is no agreement between Viroforce and R&D that this court has jurisdiction.

(d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding,

[33] Section 7 of the CJPT determines ordinary residence of a corporation when considering the territorial competence of the court in a proceeding:

Ordinary residence -- corporations

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.

[34] R&D's website describes an address and telephone number in British Columbia. However, in an affidavit sworn by Kendall Andersen, a lawyer in the firm that represents R&D at this hearing, Mr. Andersen swears to the following:

2. On August 4, 2009 I was advised by Bernard Lessard ("Mr. Lessard"), the Director of Special Projects of R&D Capital Inc. ("R&D"), and I verily believe, that:

- (a) R&D does not conduct business in British Columbia;
- (b) R&D has no employees located in British Columbia and does not maintain ...
- (c) R&D has not been registered in British Columbia as an extra-provincial corporation as it does not carry on business in British Columbia.

3. I was advised by Mr. Lessard, and verily believe, that R&D has a British Columbia address listed on their website as they had previously considered expansion of its business into British Columbia but this expansion has never occurred and no arrangements to carry on business in British Columbia were formalized.

[35] I have concluded that R&D does not have a registered office in British Columbia, nor is there any evidence before me that it is required by law to have a registered office in British Columbia. Further, there is no evidence before me that R&D has a registered address or an agent nominated upon which process may be served. R&D has no place of business or central management exercised in British Columbia.

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

[36] The presumptive factors of a real and substantial connection that exist in a proceeding are listed in ss. 10(a) through to (l) inclusive of the CJPT.

[37] Viroforce argued that subsections (a), (e), (h) and (i) establish a real and substantial connection between British Columbia and those facts presumed to exist in the proceedings:

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,

...

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,

(ii) by its express terms, the contract is governed by the law of British Columbia, or

(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in British Columbia by or on behalf of the seller,

(h) concerns a business carried on in British Columbia,

(i) is a claim for an injunction ordering a party to do or refrain from doing anything?

(i) in British Columbia, or

(ii) in relation to property in British Columbia that is immovable or movable property,

[38] Subsection (a) relates to the enforcement, assertion and determination of possessory rights and security interests in immovable and moveable property in British Columbia.

[39] Viroforce and Mr. Boast argue subsection (a) ought to be presumed as BDBC has security on the assets of Viroforce located in British Columbia, which loan agreement was secured by the general security agreement, all of which were signed in British Columbia and are to be interpreted by the laws of British Columbia. This cannot be a consideration as Viroforce claims in its statement of claim do not relate to BDBC or its security.

[40] R&D argues that a monetary debt is not moveable property or immovable property. This was not disputed by Viroforce.

- [41] Viroforce asserts s. 10(e) creates a real substantial connection with British Columbia as the funds were advanced to it in British Columbia and received in British Columbia. The performance of the TLA is to pay the money owing pursuant to the TLA in Quebec. A debtor resident in British Columbia, R&D asserts, does not create a presumption of a real and substantial connection to British Columbia courts.
- [42] Section 10(e)(i) states that the "contractual obligations, to a substantial extent" were performed in British Columbia. The performance of the obligation of the contract was to the pay the debt to R&D. R&D is ordinarily resident in Quebec which is where Viroforce pays R&D. Clause 2.5.2 of the TLA requires all payments "shall be paid directly to Lender". The Lender is R&D who describes its principal place of business as an address in Montreal, Quebec, the same address described as the address on the face of the amended writ in this proceeding. Section 10(e)(ii) presumes that the contract is governed in express terms by the law of British Columbia. The TLA does not expressly state that the contract is to be governed by the laws of British Columbia. The TLA expressly states that the law of Quebec governs it.
- [43] Section 10(h) creates a presumption a real and substantial connection where the proceeding "concerns a business carried on in British Columbia". R&D argues that the business must be that of R&D and not Viroforce. Otherwise, this would permit a real and substantial connection to be presumed based on the Viroforce's business in British Columbia. R&D submit that if this is a presumption, then the mere presence of Viroforce's business in British Columbia "will create a presumption that any action in which in which they [Viroforce], become involved, in any jurisdiction, has a "real and substantial connection" to British Columbia. R&D does not carry on business in British Columbia. This, in my view, is a restatement of Iskander "that there is no real and substantial connection in British Columbia based on the bare residency of the plaintiff in the jurisdiction. This is not the meaning intended by s. 10(h).
- [44] Section 10(h) presumes "a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding:
- (h) concerns a business carried on in British Columbia,
- [45] The claims in this proceeding made by Viroforce do not relate to its business or any other business, rather the claim put forward by Viroforce is a claim for a declaratory order as to the amount owing to R&D after taking into consideration payments made by Viroforce, the calculations of capital, interest and penalties and finally whether the interest that R&D alleges is owing is contrary to applicable usury laws.
- [46] Section 10(i) creates a presumption of real and substantial connection to British Columbia where the proceeding "is a claim for an injunction ordering a party to do or refrain from doing anything (i) in British Columbia, or (ii) in relation to property in British Columbia that is immovable or movable property. Viroforce makes no such claim in this proceeding.
- [47] I find that jurisdiction simpliciter is not established.

[48] However if I am wrong, s. 11 of the CJTP is a codification of forum conveniens and permits the court to decline jurisdiction in favour of "a more appropriate forum in which to hear the proceeding".

[49] Section 11(2)(a)-(f) of the CJTP enumerates the relevant factors to consider.

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.

Section 11(2)(a)(b):

[50] R&D is a Quebec corporation having no presence in British Columbia that is it has no registered office, no personnel or offices in British Columbia.

[51] It will be more expensive for R&D to litigate this matter in British Columbia as witnesses will have to be located in British Columbia or alternatively travel from Quebec to prove the law in Quebec as required by clause 7.7 of the TLA. This is both inconvenient and expensive for R&D. Whether this action is heard in British Columbia or Quebec witnesses will be required to travel.

Section 11(2)(c)(d):

[52] At present there are two legal proceedings in existence: one in Quebec and this proceeding British Columbia. The proceeding in Quebec seeks the repayment of its loan and as part of that procedure it will be required to interpret the TLA proving the amount that is capital, that which is interest and determine whether the allegations of Viroforce as to the interest found owing is usurious. On the other hand, Viroforce's proceeding is only for a declaratory order as to what it owes R&D. R&D has already started a debt collection action in Quebec .

- [53] If this proceeding proceeded to trial, the court is likely to interpret the TLA in accordance with the law of Quebec and determine the amount owing to R&D. It is unlikely to be just an arithmetic procedure.
- [54] The Quebec proceeding will likely do the same, but also order payment of the amount due to R&D by Viroforce.
- [55] The granting of a stay in this proceeding resolves the desirability of avoiding multiplicity of legal proceedings and avoiding conflicting decisions in different courts.
- [56] In the TLA, Viroforce and R&D agreed to the law of Quebec to govern the TLA in section 7.7. R&D and Viroforce agreed to a forum selection clause:

7.8 Choice of Venue

The parties agree, in respect of any claim or legal proceedings for any purpose whatsoever, in connection with the Agreement, to elect the judicial district of Montreal, province of Quebec.

- [57] This clause is not ambiguous as alleged by Viroforce. Viroforce did not demonstrate the ambiguity in this clause. In *BC Rail Partnership v. TrentonWorks Ltd.*, 2003 BCCA 597, Mackenzie J.A. for the court quotes Mr. Justice Bastarache in *Z.I. Pompey Industries v. ECU-Line N.V.* (20203), 224 D.L.R (4th) 577, 2003 SCC 27:

20 Forum selection clauses are common components of international commercial transactions, and are particularly common in bills of lading. ... These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law: ...The "strong cause" test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. ...This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause.

Section 11(e):

- [58] If Viroforce is permitted to continue with this proceeding there will be no judgment as to the payment of R&D by Viroforce. Judgment, as matters now stand for the payment of the loan by Viroforce to R&D, would emanate from the Quebec court. There has been no reason disclosed why the judgment could not be enforced.

Section 11(f):

- [59] By starting this proceeding, Viroforce has taken jurisdictional advantage in British Columbia while at the same time refusing to perform their obligations pursuant to the TLA under Quebec law.

[60] Mr. Boast complains that he will be unable to represent himself and Viroforce in Quebec. I have already dealt with that earlier in these reasons. Further, Viroforce and Mr. Boast assert that they will be "greatly disadvantaged" as R&D would conduct the proceeding in Quebec in French. There is no evidence before me that this is the case or that Viroforce could not conduct their defence in English in the Quebec court.

DECISION

[61] I am satisfied that there is another forum in which justice can be done between Viroforce and R&D. The Quebec court is the more appropriate forum in which to have this litigation determined.

[62] I direct that this proceeding be stayed.

COSTS

[63] Costs to follow the event.

"H.C. Hyslop J."

HYSLOP J.

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