SUPREME COURT OF YUKON

Citation: *Ferrari v. Feurer*, 2020 YKSC 29

Date: 20200803
S.C. No. 18-A0096
Registry: Whitehorse

BETWEEN

SYLVA FERRARI

PLAINTIFF

AND

ARMIN FEURER
and
VRENY FEURER, also known as VERENA FEURER

DEFENDANTS

Before Madam Justice S.M. Duncan

Appearances:
Meagan Lang — Counsel for the plaintiff
Gregory Norman — Counsel for the defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the defendants, Mr. Armin Feurer and Ms. Vreny Feurer ("the Feurers"), to strike out, stay or dismiss the proceeding on the ground that the Supreme Court of Yukon does not have jurisdiction or should decline jurisdiction over the claim. They also request an order transferring the proceeding in whole or in part to the Court in Switzerland or to the Court of Queen's Bench of Alberta. The defendants/applicants bring this application under Rule 14(4)(b) and 14(5), of the Yukon *Rules of Court*, O.I.C. 2009/65.

[2] The issue raised by this application is whether the Supreme Court of Yukon has jurisdiction to hear the matter. Neither the legal test nor the facts, for the most part, are in dispute; rather, it is the interpretation of those facts for the purpose of the jurisdictional argument and the outcome that are in dispute.

[3] The Court must decide first whether there are sufficient facts to meet the test for jurisdiction. If jurisdiction is found, the Court must then decide whether it should decline jurisdiction because there is clearly another more appropriate forum, in this case, Switzerland or Alberta. Finally, if the test for transfer of the proceeding is met, the question is whether or not it should have conditions related to limitations defences.

[4] In the following, I will set out the factual background to this case, the legal test and its application to the facts.

BRIEF CONCLUSION

[5] My conclusion in brief is that the Supreme Court of Yukon does have jurisdiction on the basis of a real and substantial connection. Specifically, the contractual obligations were performed or were expected to be performed to a substantial extent in the Yukon. The Court should not decline to exercise jurisdiction because neither Switzerland nor Alberta is a clearly more appropriate forum. There is no need to consider the conditional transfer of the proceeding, because of my conclusion that the Supreme Court of Yukon has jurisdiction.

BACKGROUND

[6] This background is from the statement of claim, statement of defence, and the sworn statements from Armin Feurer, dated February 18, 2020, and from Sylva Ferrari, dated May 13, 2020.

[7] The plaintiff/respondent, Ms. Sylva Ferrari, and the defendants/applicants, Mr. Armin Feurer and Ms. Vreny Feurer, became friends in Switzerland.

[8] In 2010, Ms. Ferrari agreed to loan monies to the Feurers to enable them to relocate to the Yukon. Ms. Ferrari advanced monies on three occasions ("the loan"):

i. On May 27, 2010, Swiss francs in the amount of $56,000 (CAD) to the Feurers' bank account in Switzerland;

ii. On June 24, 2010, $11,000 (CAD) in cash to the Feurers; and

iii. On July 7, 2010, Swiss francs in the amount of $200,000 (CAD) to the Feurers' Swiss bank account.

[9] The Feurers moved to the Yukon from Switzerland on or about June 24, 2010. The loan from Ms. Ferrari was to be interest free until June 30, 2012, interest at 1.25% from July 1, 2012, to February 1, 2014, and 1% from February 1, 2014, until repaid. The loan was repayable on demand. There was no written agreement.

[10] Ms. Ferrari understood that the purpose of the loan was for the Feurers to purchase the Stardust Motel in Haines Junction, Yukon. The Feurers purchased the motel on or about December 15, 2010, and say they used their own funds. The Feurers also purchased a home in Haines Junction some time in 2010. In October 2013, while they were living and working in Haines Junction, the Feurers repaid $100,000 (CAD) of the loan after receiving the first formal demand letter in early 2013. The Feurers had been able to obtain a mortgage on their house in Haines Junction. The repayment monies were transferred from the Feurers' Swiss bank account to Ms. Ferrari's Swiss bank account.

[11] Further loans were made by Ms. Ferrari in 2012, 2013 and 2014 for monies owing by the Feurers in Switzerland, related to property gains taxes resulting from the sale of their house there. They amounted to $783.15 (CAD) in 2012; $521.44 (CAD) in 2013; and $27,225.80 (CAD) as final settlement of property gains taxes owing in 2014.

[12] In August 2016, the Feurers purchased a vacant lot beside their home in Haines Junction.

[13] Ms. Ferrari initiated this claim after sending demand letters in 2015, 2017, and 2018 to the Feurers at their Yukon address for repayment of the loan, to no avail. The claim is for judgment in the amount of 137,625 Swiss francs as expressed in Canadian dollars at the date of judgment, plus pre and post judgment interest. The Feurers' defence is that the monies were a gift, not a loan, and they are not liable for any further repayment.

[14] The Feurers now live in Lethbridge, Alberta. A one-year lease for a house, commencing July 1, 2018, was signed in June 2018. They attest that they moved to Lethbridge on or about September 10, 2018, approximately one month before the statement of claim was filed. The house and vacant lot in Haines Junction were sold in February 2019, and the motel was sold in May 2019, with a take-back mortgage in favour of the Feurers. The Feurers do not own any assets in the Yukon, with the possible exception of the mortgage over the motel.

ANALYSIS

Legal test for jurisdiction

[15] Jurisdiction under the *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7 ("*CJPTA*"), includes subject matter competence and territorial competence.

Their definitions are inter-related. Subject matter competence means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence. The defendants did refer to subject matter competence in their material as a basis for their argument that the Supreme Court of Yukon does not have jurisdiction. However, they did not articulate any factors in support of the absence of subject matter competence in this case. I will focus my analysis on the arguments related to the territorial competence aspects of jurisdiction as defined under the *CJPTA*. Those aspects depend on a connection between the territory or legal system of the state in which the court is established, i.e. the Yukon, and a party to a proceeding in the court or the facts on which the proceeding is based.

[16] The legal test for territorial competence is codified in the *CJPTA*, specifically ss. 3, 10 and 11. Territorial competence is determined exclusively by these statutory provisions. The existence of jurisdiction is not a matter of judicial discretion (*Caglar v. Moore*, [2005] O.J. No. 4606 ("*Caglar*"), para. 21).

[17] The relevant part of s. 3 of the *CJPTA* states:

> 3 A court has territorial competence in a proceeding that is brought against a person only if
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> …
>
> (d) that person is ordinarily resident in the Yukon at the time of the commencement of the proceeding; or
>
> (e) there is a real and substantial connection between the Yukon and the facts on which the proceeding against that person is based.

[18] Section 10(1)(e)(i) sets out the meaning of real and substantial connection that is particularly relevant to this case, as follows:

> 10(1) Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Yukon and the facts on which a proceeding is based, a real and substantial connection between the Yukon and those facts is presumed to exist if the proceeding
>
> …
>
> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in the Yukon,
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> …

[19] The party arguing for jurisdiction (in this case, the plaintiff) has the initial burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. The threshold is not high. As long as the claims pleaded trigger one of the presumptions of a real and substantial connection, the onus will be met (*Canadian Olympic Committee v. VF Outdoor Canada Co.*, 2016 BCSC 238 ("*Canadian Olympic*"), para. 23).

[20] It is not necessary for the plaintiff to adduce evidence in support of the presumptive connecting factors. The facts asserted in the statement of claim are deemed to be proven for this purpose (*Canadian Olympic*, para. 23; *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85, at para. 34). However, where jurisdictional facts are not pleaded, affidavit evidence may be submitted in support. In this case, the plaintiff did submit an additional sworn statement. One of the defendants also submitted a sworn statement to supplement the jurisdictional facts in their statement of defence.

[21] The statutory presumption may be rebutted through proof by a party that there is no real and substantial connection between the Yukon and the facts on which the proceeding is based. The burden of proof is on the party challenging the assumption of jurisdiction (in this case, the defendant) to show that it is "plain and obvious that the action as pleaded could not lie within the territorial competence of the court" (*Canadian Olympic,* para. 24).

[22] If the defendant adduces evidence that demonstrates the tenuousness of the claim for real and substantial connection, then the burden shifts again to the plaintiff to show through evidence it has a good arguable case and that there are facts to provide a foundation for jurisdiction (*Canadian Olympic*, para. 25; *Budget Rent a Car v. Philadelphia Indemnity Insurance*, 2018 BCSC 163; *Caglar*, para. 21). A good arguable case is a lower standard than the balance of probabilities.

[23] If jurisdiction is found to exist, the next step in the legal test is set out in s. 11 of the *CJPTA*, allowing the Court to decline to exercise jurisdiction if there is another clearly more appropriate forum. This may be referred to as the application of the doctrine of *forum non conveniens.* Section 11 states:

> 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 the Yukon is more the appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
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> (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;
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> (e) the enforcement of an eventual judgement; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[24] This is a non-exhaustive list and does not preclude the consideration of other factors such as: where the loss or damage occurred; where the cause of action arose; or the existence of a juridical advantage to either party.

[25] The onus is on the defendant to show that another jurisdiction is clearly more appropriate, efficient and fair, sufficient to deny the plaintiff the benefits of their selection of the forum.

[26] The Court is to exercise discretion in the determination of the appropriate forum. No one factor is determinative; each factor is assigned weight by the Court in its discretion. Generally, discretion to decline jurisdiction is only to be exercised in exceptional cases.

[27] The test is focused on determining which forum is best able to dispose of the litigation fairly and efficiently (*Canadian Olympic*, para. 35). If two forums are roughly equivalent, then the application for a stay should be dismissed. “It is not a matter of finely weighing advantages and disadvantages but of determining whether one jurisdiction enjoys a significant advantage over that where the litigation was commenced” (*Canadian Olympic,* para. 35, summarizing *Olney v. Rainville*, 2009 BCCA 380, para. 42).

[28] The policy reason for this process is to ensure that claims are not prosecuted in a jurisdiction with little or no connection with the transaction or the parties, balanced with the right of the plaintiff to choose their forum.

Application of Legal Test to the Facts

1. Jurisdiction Simpliciter - ordinarily resident or real and substantial connection

a) Ordinarily resident

[29] Ordinarily resident means where a person in the settled routine of their life regularly, normally or customarily lives. It is possible to be ordinarily resident in more than one jurisdiction (*Broad v. Pavlis*, 2015 BCCA 20 ("*Broad*"), at paras. 22 - 26).

[30] Section 3 of the *CJPTA* directs the court to determine if the defendant is ordinarily resident in the Yukon at the commencement of the proceeding. In this case, the plaintiff filed her claim in the Supreme Court of Yukon on October 5, 2018.

[31] The defendants depose that they moved from Haines Junction, Yukon, to Lethbridge, Alberta, on September 10, 2018. They rely on:

i. a one-year lease commencing July 1, 2018, for a house in Lethbridge, where they depose they still live;

ii. a bill of lading/receipt from a moving company of 4,000 lbs of household goods transported from Haines Junction to the same address in Lethbridge as is on the lease, dated August, 23, 2018; and

iii. the sale of their real estate holdings in Haines Junction in 2019.

[32] The plaintiff says the defendants were resident in the Yukon on October 5, 2018 and relies on:

i. the defendants' signature dated August 31, 2018, confirming receipt of the demand letter from the plaintiff sent to their PO Box in Haines Junction;

ii. an email dated September 10, 2018, from the Feurers to counsel for Ms. Ferrari, requesting more time to respond to her August 31, 2018 demand letter because they were driving their daughter to Lethbridge for her new job;

iii. the defendants' continued ownership of a house, lot, and motel in Haines Junction on October 5, 2018; and

iv. the defendants' presence in the Yukon when the house, lot and motel were sold in February and May 2019.

[33] The plaintiff says she has an arguable case that the Feurers maintained their ordinary residence in the Yukon until early 2019, although she concedes that they also may have been ordinarily resident in Lethbridge at the same time.

[34] The defendants have not explained the discrepancy between the email to the plaintiff dated September 10, 2018, stating they were driving their daughter to Lethbridge for her new job, and their statement in this application that they themselves moved to Lethbridge, effective September 10, 2018. The bill of lading/receipt is also not clear as to whether this includes their daughter's possessions only, and/or the Feurers household goods. The defendants' affidavit states that it does represent the moving of their household possessions.

[35] Despite these gaps, I find the defendants have established through all of their evidence that they were likely ordinarily resident in Lethbridge, Alberta, at the commencement of this proceeding on October 5, 2018. While they continued to have

ties with the Yukon for some months after September 2018, through their property ownership, there is no evidence they continued to live in Haines Junction after September. The fact that they were in the Yukon, notably in Whitehorse and not at their residence in Haines Junction, on the dates of the sales of their properties is not evidence that they continued to have a settled routine of their life in the Yukon at that time. The case relied on by the plaintiff in which more than one ordinary residence was found was a situation in which a plaintiff of significant financial means had more than one residence in different jurisdictions and spent their time living in both as part of their lifestyle (*Broad*). The facts here are different.

[36] The plaintiff has not made out an arguable case in the face of the evidence that the defendants were ordinarily resident in the Yukon on October 5, 2018.

b) Real and substantial connection through performance of contractual obligations

[37] One of the presumptive factors in s. 10 of the *CJPTA* for establishing a real and substantial connection is the place where contractual obligations are to be performed to a substantial extent. Although the defendants dispute that there was an agreement or contract with the plaintiff pursuant to which they had obligations, as noted above, the facts pleaded are deemed to be true for the purpose of a jurisdictional determination.

[38] Performance of contractual obligations requires a consideration of the contract in its entirety. Performance is not limited to where the contract was made or signed. The nature and performance of the obligations must be analyzed to determine if there are circumstances that connect those obligations and their performance to the forum. It is not necessary for there to be only one forum with a real and substantial connection to

the performance of the contractual obligations. The wording of the statute uses the word "a" real and substantial connection, not "the" real and substantial connection.

[39] Here, it is not in dispute that the arrangement for monies to be transferred originated in Switzerland, where all parties lived at the time. The plaintiff remains ordinarily resident in Switzerland. The monies were transferred from the plaintiff's Swiss bank account to the defendants' Swiss bank account, and the partial repayment made by the defendants was also done through the Swiss bank accounts.

[40] The nature of the agreement was a loan of monies from the plaintiff to the defendants, in order to assist the defendants in moving to Canada, specifically to Haines Junction in the Yukon, according to the plaintiff. Although the defendants deny that the funds were transferred pursuant to an agreement, they do not deny they received the funds. The defendants strongly deny that the loan was used to purchase the motel but they do not deny its general purpose of assisting with their relocation to the Yukon.

[41] The funds were advanced in May, June and July 2010, just before and just after the defendants moved to the Yukon. The plaintiff began to demand repayment on the loan in early 2013 after the defendants had bought their house and the motel. A partial repayment of $100,000 was made in October 10, 2013, (supporting the allegation that the advanced monies were a loan and not a gift), after the defendants obtained a mortgage on their home, which they depose was purchased mortgage free. The repayment was made by the defendants while they were in the Yukon.

[42] The timing of this repayment and the mortgage of their home suggests they used the loan to assist in purchasing the home. Whether the loan was used to purchase the

home or the motel is not particularly relevant; what is relevant is the defendants' acceptance of the monies around the time they moved to the Yukon, and their successful purchase of properties in the Yukon soon after that move.

[43] Further demands for repayment of the balance of the loan were made by the plaintiff in 2015, 2017, and 2018, while the defendants were living and working in the Yukon. Other than the partial repayment in 2013, the defendants did not fulfill their repayment obligations.

[44] The fact specific nature of this inquiry means there is no case directly on point; however, I find that this case is similar to several recent British Columbia decisions.

[45] The British Columbia cases use two analytical tools in determining whether a real and substantial connection is established that are of assistance in this case. The first is an inquiry into the expectations of the parties at the time of the initial agreement about where obligations would be performed. The second is the assessment of where the essential obligation under the agreement is to be performed, when a contract has international or multi-jurisdictional dimensions. It is a practical reality that parties to such a contract may perform their obligations to a substantial extent in different jurisdictions.

[46] The first analytical tool, the expectation of the parties about where the contract would be performed at the time the contract was entered into, was the focus of the court's inquiry in *Murray Market Development Inc. v. Casa Cubana*, 2018 BCSC 565 ("*Murray Market*"), and in *Snow v. R.D.E. Transport Inc.*, 2019 BCSC 2072, ("*Snow*"). In *Murray Market*, the contract for the marketing of products in Manitoba and Saskatchewan was created in Montreal and governed by Quebec law. The plaintiff was a British Columbia corporation. The court concluded that British Columbia had territorial

competence because "… it must have been within the contemplation of both parties that there were substantial contractual obligations to be performed by that party in British Columbia" (para. 23).

[47] In *Snow*, an Alberta company entered into a contract of employment with Alberta residents. They were to work as truck drivers, exclusively in British Columbia. The Supreme Court of British Columbia found it had territorial competence because the contract was to be performed in British Columbia to a substantial extent. The court reviewed the jurisdictional facts, finding they supported an inference that "work in British Columbia was likely contemplated by both parties at the time of contract formation" (para. 22).

[48] Here, the evidence from the plaintiff of the general purpose of the contract to assist the Feurers in relocating to the Yukon is not denied by the defendants, and supports the expectations of the parties that the defendants would use the loan to buy property in the Yukon and repay the loan from the Yukon. The failure to repay the loan occurred in the Yukon. The defendants sent partial repayment from the Yukon, supporting an inference that the expectation of the parties was that they would complete their obligations under the agreement from the Yukon when they had become financially established in the Yukon.

[49] The second analytical tool, the assessment of the essential obligation under an agreement with connections to more than one jurisdiction, was canvassed in *Rennison v. Rennison*, 2018 BCSC 1915. The plaintiff mother, a resident of British Columbia, loaned money to her son who lived in Ontario, so that he could buy a house. The agreement was made while the two of them were visiting in Montreal. The loan was

made by a cheque drawn on her bank account in British Columbia; was repaid to her in British Columbia; and a further advance was agreed between the parties while the son was in Quebec and the mother in British Columbia. The Supreme Court of British Columbia found that these facts did not establish that the place of performance of the contractual obligations was British Columbia.

> [9] … The fact that a loan is to be repaid to a person in a particular jurisdiction does not, in my view, mean that the loan contract is one that had to be substantially performed in that jurisdiction: it is the defendant who has to send the funds from where he or she is located. (*Rennison*, para. 9).

In that case, the court found that Quebec had jurisdiction.

[50] In *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200, the Court of Appeal for British Columbia examined the nature of a contract in the context of an international business deal. The court noted that practical realities dictated that obligations under an international commercial contract would be performed by the parties in each of their jurisdictions. In analyzing s. 10(1)(e)(i) of the British Columbia *Court Jurisdiction and Transfer of Proceedings Act*, S.B.C. 2003, c. 28, (identical in wording to the Yukon statute), the Court of Appeal wrote at para. 37:

> [37] …. the *Act* requires the Court to engage in a preliminary interpretive inquiry to determine the limited question of the jurisdiction (or jurisdictions) where the parties intended the contract to be performed. The phrase "performed to a substantial extent" clearly denotes that the contract may be performed in multiple jurisdictions: thus, it is no bar to the operation of s. 10(e)(i) to say that the contract was intended to be performed in more than one jurisdiction (which is typical in a letter of credit arrangement). 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.

[51] While the case at bar is not about an international contract between two financial institutions, it has elements of an international contract, given the place of origin (Switzerland) and purpose of the loan (relocation to the Yukon) and the location of the parties in different countries.

[52] The facts that the plaintiff has performed her obligations under the contract in Switzerland, and the defendants have partially performed their obligations in the Yukon does not preclude the Yukon from being the jurisdiction with a real and substantial connection to the performance of obligations. The essential obligations of a loan agreement are its purpose and its repayment. Here the purpose of the loan and the place of repayment were both the Yukon. There is a significant connection between the facts underlying this proceeding and the Yukon.

[53] The defendants have not been able to rebut successfully the presumption that the action as pleaded has a real and substantial connection with the Yukon. It is not plain and obvious that the Yukon does not have territorial competence. In addition, the plaintiff has made a good arguable case for jurisdiction of the Supreme Court of Yukon on the facts presented.

2. Should the Court decline jurisdiction because the Court of Switzerland or the Court of Queen's Bench of Alberta is more appropriate

[54] The test of *forum non conveniens* was succinctly stated by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, at para. 109 (quoted in *Canadian Olympic*, para. 34):

> 109 … [J]urisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied

> the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. …

[55] Although the factors in s. 11 of the *CJPTA* are non-exhaustive, it is helpful to review each of them in this analysis.

i) Comparative convenience and expense for the parties and their witnesses

[56] Ms. Ferrari is in Switzerland and the Feurers depose that most of their defence witnesses are in Switzerland or Alberta. The Feurers say it would be a financial hardship for them to conduct a trial in the Yukon, given their residence in Lethbridge, Alberta. On the other hand, their preference for the location of this proceeding is Switzerland. There is no evidence to explain why it would be less of a financial hardship to attend court in Switzerland than it would be to do so in the Yukon. It is certainly less expensive for the defendants to travel from Lethbridge to Whitehorse than it would be for them to travel from Lethbridge to Switzerland. Further, the Supreme Court of Yukon has significant experience in hearing testimony from witnesses and parties in other jurisdictions by video link and there is no reason why this could not be considered in this case.

[57] Ms. Ferrari has selected the Yukon as her preferred location to pursue this action.

[58] This factor favours the Yukon.

ii) The law to be applied to issues in the proceeding

[59] The main issue in this dispute appears to be the factual determination of whether the monies provided to the Feurers from Ms. Ferrari were a gift or a loan, and if a loan, what were its conditions for repayment. This factual determination makes the choice of law to be applied not a significant factor for the choice of forum. The two choices of law are Yukon law or Swiss law. The law of Alberta has no connection to the issues in dispute.

[60] If this is found to be a loan, and thus a contract, case law supports that the proper law of contract is determined by considering all the circumstances and applying the law with which it appears to have the closest and most substantial connection (*Imperial Life Assurance Co. v. Colmenares*, [1967] S.C.R. 443, referenced in *Caglar*, at para. 20). This does not necessarily mean the place where the contract originates, but again requires a determination of where the contract was largely performed. As noted above, there are good arguments that the performance of the essential obligations has been in the Yukon.

[61] The case can likely be determined by applying Yukon law. If Swiss law is necessary to be applied to the factual determinations, this may still be done in the Yukon, with expert evidence if necessary.

[62] This factor favours the Yukon.

iii) The desirability of avoiding multiplicity of legal proceedings; avoiding conflicting decisions in different courts; the enforcement of an eventual judgment

[63] These factors may be considered together, as they are all relevant to the consideration of the enforcement of any judgment that may be obtained by the plaintiff.

If the matter is litigated in Switzerland, and the plaintiff successfully obtains judgment against the defendants, the absence of a reciprocal enforcement of judgment statute between Switzerland and the Yukon or between Switzerland and Alberta means that in order to enforce the judgment in Canada, the plaintiff would have to re-litigate the matter. As noted by the Court in *Nagra v. Malhotra*, 2012 ONSC 4497:

> [38] The plaintiff would, no doubt, find it duplicitous to be told that his action, which he launched in Ontario, must proceed in Vermont, but that if he is successful in the Vermont litigation, he must then return again to Ontario and commence further litigation against the defendant if he wants to be able to enforce the foreign Vermont judgment against the defendant and his local assets.

[64] Switzerland is the least preferred forum when considering this factor.

[65] The plaintiff argues that this factor favours Alberta because mortgage payments are being received by the defendants in Alberta. However, the property to which the mortgage attaches is in the Yukon, creating a more substantial connection.

[66] This factor favours the Yukon. If judgment is obtained in the Yukon, and it is discovered that the defendants have assets in Alberta, the reciprocal enforcement of judgment legislation between the Yukon and Alberta may be utilized.

iv) The fair and efficient working of the Canadian legal system as a whole

[67] A relevant factor to consider in this case under the general provision of the fair and efficient working of the Canadian legal system is whether the parties gain or lose a juridical advantage through the choice of forum.

[68] A juridical advantage to the defendants of a transfer of the proceedings to Alberta, without conditions, is that the limitations period applicable to this proceeding has expired there. Similarly, it is possible that the limitations period applicable to this

case has also expired in Switzerland. Both counsel candidly stated they were unsure of this.

[69] The expiry of a limitation period in a forum under consideration generally is a factor given significant weight in the decision not to grant a stay (*Garcia v. Tahoe Resources Inc*., 2017 BCCA 39, at paras. 91 - 96). The exception to this is where there is evidence that the plaintiff intentionally waited to pursue the claim until the limitations periods expired in the possible alternative jurisdictions.

[70] Here, the two jurisdictions that were the options for the parties to resolve this dispute were Switzerland and the Yukon, until September or October 2018. Alberta became an option only recently, and in fact, Ms. Ferrari did not even know it was an option until the statement of defence was filed in April 2019.

[71] The defendants' suggestion that Ms. Ferrari is forum shopping is not well-founded. She sent demand letters on a regular basis, starting in 2013. Although she might have started the claim earlier in Switzerland, the enforcement of judgment issue was and continues to be a barrier. She did not know Alberta was an option until after the limitations period had expired there.

[72] The defendants may be losing a juridical advantage of a limitations defence by not proceeding in Alberta, or possibly Switzerland. But by allowing the transfer of this proceeding to Alberta on the basis that it is an appropriate forum to litigate this dispute is to reward the defendants for their move after the demand letters were written and knowing the plaintiff expected the contract obligations to be performed in the Yukon. To introduce a new jurisdiction at this late stage in the process, after the alleged breach of the agreement, and argue that it is clearly more appropriate is not fair nor efficient.

[73] The Yukon provides for the more fair and efficient determination of this proceeding.

[74] The defendants have not met the onus of showing that either Switzerland or Alberta is clearly a more appropriate forum.

CONCLUSION

[75] The Supreme Court of Yukon has territorial competence to determine this matter because of a real and substantial connection to the facts underlying this proceeding, particularly because the contractual obligations pleaded by the plaintiff were to be performed to a substantial extent in the Yukon. The defendants have not demonstrated that it is plain and obvious that the action as pleaded is not within the territorial competence of this Court.

[76] Further, this Court should not decline jurisdiction in favour of Switzerland or Alberta, because neither has been shown to be a clearly more appropriate forum by the defendants. The concern about enforcing any judgment if the matter were pursued successfully in Switzerland, and the existence of a limitation period in Alberta that may bar the claim are weighty factors that make it more fair and efficient for the matter to be pursued in the Yukon. The other factors in s. 11 of the *CJPTA* also favour the Yukon as the appropriate forum.

[77] For these reasons, the application is dismissed.

[78] Costs may be spoken to at case management if necessary.

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DUNCAN J.