SUPREME COURT OF YUKON

Citation: Piscedda Mining Construction International Inc v. Crew Gold Corporation, 2011 YKSC 79

Date: 20111028
S.C. No. 10-A0090
Registry: Whitehorse

Between:

Piscedda Mining Construction International Inc., Piscedda Mining Corporation Guinée s.a.r.l., Peter Lockhart, Duncan Campbell Ferguson

Plaintiffs

And

Crew Gold Corporation, Delta Gold Mining Ltd., Société Miniére de Dinguiraya, Crew Acquisition Corporation, Guinor Gold Corporation, Kenor AS, Cameron G. Belsher, Simon Russell, Richard Robinson, William Leclair, Brian Hosking, Emil Morfett, Jens Ulltveit-Moe, Neil Hepworth and David Ford

Defendants

Before: Madam Justice C.A. Kent

Appearances:

David J. Wachowich, Q. C.
James W. Rose, Q. C.
Counsel for the Plaintiffs

J. Kenneth McEwan, Q. C.
Claire E. Hunter
Counsel for the Defendants

REASONS FOR JUDGMENT

Introduction

[1] Piscedda Mining Corporation Guinée (PMC Guinée) is a company formed pursuant to the laws of Guinea. Piscedda Mining Construction International Inc. (PMCI) is a Delaware company. Peter Lockhart and Duncan Campbell Ferguson are residents of either Guinea or Scotland. They collectively are the Respondents. Delta Gold Mining Ltd. (Delta) is a corporation registered in Jersey, Channel Islands. It owns all of the

shares of Société Miniére de Dinguiray (SMD) which is registered under the laws of Guinea. SMD owns the mining licence for the LEFA Gold Mine in Guinea. All of the shares of Delta are owned by Kenor AS, a Norwegian corporation. All of the shares of Kenor are owned by Guinor Gold Corporation (Guinor Gold) a corporation registered in the Yukon. Crew Gold Corporation (Crew) is an international mining corporation originally incorporated in British Columbia, but now registered in the Yukon. In 2005, Crew purchased all of the shares of Guinor Gold through a subsidiary, Crew Acquisition Corporation, registered in British Columbia. None of the individual defendants are resident in the Yukon. The defendants collectively are the Applicants.

[2] On July 1, 2006, PMCI and Delta entered into a contract with respect to the LEFA gold mine, Delta being identified in the contract as "the company" and PMCI as "the contractor". An issue arose between the parties so that Delta served PMCI with a notice of default. PMCI responded, disputing that it was in default. Delta took the position that it had the contractual right to take over the work from PMCI and took action to do so.

[3] The Respondents brought this action alleging that the Applicants, with the assistance of the Guinean Military, unlawfully seized corporate and personal property of Piscedda, and jailed one Piscedda employee. The Respondents allege further that Crew improperly registered legal instruments in Guinea securing Piscedda property, obtained inappropriate court orders and otherwise unlawfully interfered with Piscedda property. As a result, the action alleges that they breached the contract, negligently or fraudulently misrepresented how contractual disputes would be resolved, conspired together in the Yukon and elsewhere to injure the Respondents, unlawfully interfered with the economic interests of PMCI, falsely imprisoned Piscedda employees, converted

Piscedda assets and were unjustly enriched by their actions. Piscedda claims approximately $127 million of contractual damages, general damages for false imprisonment of employees, $20 million in punitive damages, and other consequential relief.

The Contract

[4] Clause C1 provides as follows:

> The Contract shall be governed and construed in accordance with the law in force in South Africa and the parties hereby submit to the jurisdiction of the courts of that Country.

[5] Clause 40 deals generally with the resolution of disputes, provides timelines for notification of a dispute and says at 40.3:

> The Clause shall constitute each party's irrevocable consent to the arbitration proceedings and no party shall be entitled to withdraw from such arbitration proceedings or to claim that it is not bound by them.

[6] Clause 40.3 also prescribes South African arbitrators and provides further that "arbitration shall be held in South Africa or at a mutually agreeable location or as determined by the arbitrator."

The Evidence

[7] Both sides filed affidavits from South African lawyers on the issue of whether South Africa would accept jurisdiction in this case. The Respondents' expert is Mr. Dennis Fine, an advocate of the High Court of South Africa. He was called to the Bar in 1974 and was appointed senior counsel in 1989. He practises in Johannesburg. For terms in 1991, 1994 and 2000, he acted as a judge of the High Court. It is his opinion that South African courts would refuse to take jurisdiction if this claim were filed in South

Africa. South Africa is divided into divisions and the original jurisdiction of each division is territorial. A resident of one division of South Africa may be regarded as a peregrinus (foreigner) of another division. A South African of another division is a local peregrinus while a litigant who is not resident in any division is a foreign peregrinus. A person who is resident in a jurisdiction is an incola.

[8] Mr. Fine cites the case of *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* (in Liquidation), 1987 (4) SA 883 (A) to support his conclusion that a court in South Africa would not accept jurisdiction. In that case, the plaintiff was an Italian company. It sued the defendant in the Durban and Coast Local Division. The defendant had its head office in Johannesburg. Thus, the plaintiff was a foreign peregrinus and the defendant was a local peregrinus. The parties had consented to the Durban and Coast Local Division having jurisdiction. The first instance court held that submission or consent to jurisdiction was insufficient to confer jurisdiction even though the defendant was an incola of South Africa. Moreover, neither of the parties were domiciled or resident in the division and the contract was neither concluded or performed in the division. The Appellate Division confirmed the decision. Mr. Fine opines that *Veneta* applies even more so when both parties are peregini South Africa.

[9] Mr. Fine says that there is another reason why the court would decline jurisdiction. Even though the parties to the contract are PMC and Crew, there are many other defendants who are not parties and against whom substantive claims are made. They did not consent to the jurisdiction of the South African courts nor did they consent that disputes between them and the plaintiffs be determined by South African law. Belated consent will not confer jurisdiction. Finally, because some of the claims are not

based on the contract, consent to the jurisdiction of the South African courts would not apply.

[10] The Applicants submitted the opinion of Mr. Alan Dodson. Mr. Dodson is an advocate in Johannesburg with the rights of appearance in all courts in South Africa. He was admitted to the bar in 1987 and practised as a solicitor until 1995. From 1995 to 2000 he was a judge (fixed term) in the Land Claims Court. Since 2001, he has practised as an advocate. He was recently appointed a senior counsel. Mr. Dodson begins his opinion with a history of the South African legal system. He then notes that from 1992 to 1996, there was a fundamental constitutional transformation in the country. He says that in the new constitution, it is ambiguous whether each division became a high court or whether several divisions of one high court remained. As a result of the decisions in *National Union of Metalworkers of South Africa & Others v Fry's Metals (Pty) Ltd*, 2005 (5) SA 433 SCA, and *Chevron Engineering (Pty) Ltd v Nkambule & Others*, 2003 (5) SA 206 (SCA), to determine jurisdiction, you must first look to the constitutional provisions. While the Constitution did not do away with the common law, it is open to the courts to adopt an interpretation of the Constitution different from the common law. As a result, Mr. Fine's conclusion that it is the common law that will determine jurisdiction is not a complete reflection of the current legal regime. He also notes that now South Africa is politically and economically integrated with the rest of Africa and the global economy, a situation different than during the apartheid period in South Africa.

[11] Mr. Dodson reviewed five cases all of which addressed the constitutional developments in South Africa. In *American Flag plc v Great African T-Shirt Corporation* CC, 2000 (1) SA 356 (W), the court noted that in questions of jurisdiction, consent is

part of the law. Mr. Dodson cites it as authority for a narrow reading of *Veneta*. Likewise in *Jamieson v Sabingo*, 2002 (4) SA 49 (SCA) and *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd*, 2005 (2) SA 522 (SCA), the court relied heavily upon the consent to jurisdiction to confer jurisdiction. In a class action, *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape & Another*, 2001 (2) SA 609 (E), the court noted that even applying jurisdictional rules to extra-jurisdictional parties strictly, the Constitution required that the rules be adjusted in class action cases to be practical and sensible.

[12] As a result of these cases, Mr. Dodson notes the following trends:

- A trend away from the rigid rules of Roman-Dutch common law regulating jurisdiction with the current approach being more flexible based on considerations of convenience and appropriateness of the forum;
- The provisions of the Constitution permit courts to regulate their own process;
- Recognition by courts of the political and economical context in which they work and the need to accommodate globalisation;
- Recognition of the need to tie in with the approaches of South Africa's major trading partners, particularly England where a party who has consented to a particular jurisdiction cannot then challenge the binding effect of a judgment;

- Increasing acceptance that consent is a stand-alone, valid and effective ground of jurisdiction, although there is no case yet where consent alone has been found to be adequate; and
- Consent to jurisdiction is not incompatible with the doctrine of effectiveness of enforcement.

[13] Mr. Dodson's conclusion is that it is not certain that a South African court would decline jurisdiction and the law on the issue is not settled.

The Issues

[14] The Applicants bring this application for an order dismissing the action because the facts, if true, do not establish that the Supreme Court of Yukon has jurisdiction over the Applicants in these proceedings or because the Court should decline to assume jurisdiction under the doctrine of *forum non conveniens*.

The Applicants' Argument

[15] The Applicants argue that this is a contract dispute at its heart. The events which precipitated this contractual dispute all occurred in Guinea. Delta was the Applicant who took action which, Delta says, was authorized pursuant to the contract. Counsel for the Applicants divide the Applicants into three groups: Delta which was the contracting party that took over the work from Piscedda, the corporate applicants who are up the corporate chain from Delta, and directors and officers. The Applicants say that there is no good arguable case against any of the Applicants except Delta; for all three categories of applicants, the real and substantial connection test is not met to establish jurisdiction; there is a forum selection clause that should apply; and in any event, Yukon is not the *forum conveniens*.

[16] The Applicants point out that rules of court that permit service outside the jurisdiction on the basis that the foreign party is a necessary and proper party do not result in a presumption in favour of taking jurisdiction. They cite the Uniform Law Conference of Canada's commentary to section 10 of its model *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*), in *Proceedings of the Seventy-Sixth Annual Meeting, Charlottetown, 1994* (Toronto: The Conference, 1995), where it said, at 151:

> One common ground for service *ex juris* is not found among the presumed real and substantial connections in section 10 [of the uniform Act], namely, that the defendant is a necessary or proper party to an action brought against a person served in the jurisdiction. The reason is that such a rule would be out of place in provisions that are based, not on service, but on substantive connections between the proceeding and the enacting jurisdiction.

That reasoning was followed in *Van Breda v. Village Resorts Limited*, 2010 ONCA 84.

[17] The Applicants group the Defendants and address each group in determining whether the group has a substantial connection to the jurisdiction. With respect to the non-resident corporations and the Yukon, the Respondents plead that Crew, the Yukon corporation, acted as the agent and alter-ego of the non-resident defendants. As a result, the obligations of the non-resident defendants are the obligations of Crew. The Applicants argue that there is no good arguable case that that proposition is correct. They cite *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258, 60 D.L.R. (4th) 30 (C.A.) to argue that making one company liable for the acts of an associated company can only occur when there is something fraudulent in using the associated company to do something. In this case, the only plea is that Crew dominated everything. In *Preeco*, the British Columbia Court of Appeal reviewed the cases where the corporate veil was pierced and noted that in no case was one

corporation found to be liable for another's contract (at para. 47). The Respondents have not provided any cases either. Moreover, there is no allegation or evidence that Delta or any other corporate defendant was created expressly to avoid existing obligations.

[18] Second, dealing with the non-resident directors and officers, the Applicants argue that the law is clear that directors and officers cannot be held civilly liable for the acts of the corporation. In response to the Respondents' argument that the claims against these defendants can be sustained because they are alleged to have committed the tort of conspiracy, inducement of breach of contract and intentional interference with economic relations, these claims have not been properly plead. The pleadings lack sufficient details as was the case in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97, 155 D.L.R. (4th) 627 (C.A.) and *Amdahl Canada Ltd. v. Circle Computer Services Inc.*, 50 C.P.R. (3d) 386, [1993] O.J. No. 1741 (Ont. Gen. Div.).

[19] The Respondents submit that the court should not look at individual defendants but consider the claim and all the defendants as a whole: *McNichol Estate v. Woldnik*, 150 O.A.C. 68, [2001] O.J. No. 3731 (C.A.), leave to appeal to S.C.C. refused, 294 N.R. 396 (note), 170 O.A.C. 399 (note), at paras. 12-13, per Goudge, J.A. In response the Applicants say that the reasoning in *McNichol Estate* does not apply here. In *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68, 213 D.L.R. (4th) 651 (C.A.), Sharpe, J.A. distinguished *McNichol* from the facts before him on the basis that "[i]n *McNichol*, the core of the plaintiff's claim was against the domestic defendants" (at para. 20). In that same paragraph, he went on to say that "[j]urisdiction over claims against extra-

provincial defendants should not be bootstrapped by such a secondary and contingent claim against a provincial defendant."

[20] More generally, they say that those allegations do not establish a real and substantial connection between the Yukon and any of the non-resident defendants. They cite *Williams v. TST Porter dba 6422217 Canada Inc.*, 2008 BCSC 1315, a case where the plaintiff was injured in a car accident in Alberta. He sued in British Columbia against the driver of the other vehicle who was an Alberta resident and that person's employer who was the registered owner of the vehicle and a federal corporation with a registered office in British Columbia. The defendant conceded that there was jurisdiction over the corporate defendant. However, the court found that other than the facts that the corporate defendant was registered in British Columbia and the plaintiff was a British Columbia resident, there was no other connection. Those two factors were insufficient to establish a real and substantial connection with the defendant driver. The Applicants argue that this case is similar. The residence of Crew in the Yukon is insufficient to establish a real and substantial connection against the non-resident defendants.

[21] The Applicants note that except for the civil conspiracy claim, all of the alleged acts occurred in either Guinea or the United Kingdom. As noted above, with respect to the civil conspiracy claim, the Applicants say that the pleading which does not specify the place or the dates of this conspiracy is so bare of details that it cannot found a real and substantial connection between the Yukon and the non-resident defendants.

[22] The Applicants argue that the Yukon resident corporations, Crew and Guinor Gold, likewise have no real and substantial connection with the Yukon. Although they have registered addresses in the Yukon, neither carries on any business, maintain any

offices, conduct any business, or have any assets or employees in the Yukon. That is unlike the facts in *Alliance Technology and Developments Ltd. v. Creative Entertainment Technologies Inc.,* [1999] Y.J. No. 29, 1999 CarswellYukon 8 (S.C.), where the court found that the rights of the parties depended upon the interpretation of Yukon statutes so there was a real and substantial connection.

[23] The Applicants then argue that even if the court finds that it could have jurisdiction, the forum selection clause should govern. Here, the parties selected South Africa as their forum. In the face of such a connection, there must be strong cause for a Canadian court to exercise its jurisdiction. In *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 at para. 20, the Supreme Court said that the strong cause 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. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements.

In *Pompey*, the court made it clear that a forum selection clause is not simply one factor in considering the *forum non conveniens* doctrine, but rather the starting point (at para. 21).

[24] The Applicants argue that the evidence submitted from Mr. Fine about whether South Africa would assume jurisdiction is not determinative. Given the competing opinion from Mr. Dodson that questions Mr. Fine's analysis, it is not clear that Mr. Fine's opinion is correct and in any event, Mr. Dodson's opinion ought to be preferred because he considers cases decided after the introduction of the new Constitution, and the arbitration clause contained in the contract. It is not clear that a South Africa court would decline jurisdiction and it is unconscionable for Piscedda to have contracted to submit to

South African courts and then submit the opinion of a South African lawyer that South Africa is not available. Finally they point out that after the contract was concluded Delta asked to amend the clause to make English law the governing law. Piscedda said no, citing the lower costs of litigating in South Africa and the fact that South African courts had more experience in dealing with mining cases. In respect of the argument that some parties are not parties to the contract, all defendants now agree to submit to the jurisdiction of South Africa.

[25] The Applicants then argue that if the forum selection clause does not govern, the proceedings should be stayed based upon the *forum non conveniens* doctrine. They note that the contract was negotiated in Switzerland, the applicable law is South Africa, the location of witnesses, particularly key witnesses is Guinea or the United Kingdom, the facts giving rise to the action occurred in Guinea, attempts to resolve the matter occurred in Guinea and the United kingdom, and all but two of the plaintiffs and defendants reside outside the Yukon, in Guinea, Delaware, the United Kingdom and other European countries. They also note the proximity of Guinea to South Africa. Finally, they say that the arbitration clause which identifies South Africa as the forum in which to arbitrate supports the conclusion that there is very little connection with the Yukon and that South Africa is the best forum.

[26] In response to the Respondents' argument that this is an appropriate case for the application of the doctrine of forum of necessity, the Applicants say that this is not an exceptional case. They rely upon the decision of *Lamborghini (Canada) Inc. v. Automobili Lamborghini S.P.A.,* [1997] R.J.Q. 58, 68 A.C.W.S. (3d) 62 (C.A.) at para. 45, where the court said that a similar provision in the Quebec Civil Code represents "a very narrow exception to the normal rules regarding jurisdiction" (English translation

found in *Josephson (Litigation Guardian of) v. Balfour Recreation Commission*, 2010 BCSC 603 at para. 89). Here it is not certain that South Africa would decline to accept jurisdiction. Moreover, there is another forum – England.

The Respondents' Argument

[27] The Respondents argue that this case is more than a contractual dispute, including allegations of fraud and improper seizure of assets tantamount to criminal activity. In terms of the appropriate framework for analysis, the court should determine whether the plaintiffs have shown that the court has jurisdiction because of valid service upon all defendants. If not, then the court must determine if there is a real and substantial connection between the action and either the parties or the subject matters of the litigation. Finally if the court determines it has jurisdiction, it must determine if it should exercise its discretion to decline jurisdiction on the basis of *forum non conveniens*. They say that the Applicants have confused the analysis by drawing a distinction between the resident and non-resident defendants. Furthermore, the Applicants put too much emphasis on the choice of forum and place of arbitration clauses.

[28] After reviewing the historical development of the principles of real and substantial connection and *forum non conveniens*, the Respondents note that in *Muscutt*, (2002), 60 O.R. (3d) 20, 213 D.L.R. (4th) 577 (C.A.) the court quoted Goudge, J.A. in *McNichol Estate* at paras. 12-13:

> [12] I do not agree that where an action has some claims with an extraterritorial dimension, and others which have none, the former must be separated and tested in isolation. To do so would be contrary to the direction set by *Morguard* and *Hunt*. ...

> [13] Rather, I think that the approach prescribed by *Morguard* and *Hunt* requires the court to evaluate the connection with Ontario of the subject matter of the litigation framed as it is to include both the claim against the foreign defendant and the claims against the domestic defendants. In doing so, the courts must be guided by these requirements of order and fairness. If it serves these requirements to try the foreign claim together with the claims that are clearly routed in Ontario, then the foreign claim meets the "real and substantial connection" test. This is so even if that claim would fail a test if it were constituted as a separate action. This approach goes beyond showing that the foreign defendant is a proper party to the litigation. It rests on those values, namely order and fairness, that properly inform the real and substantial connection test and allows the court the flexibility to balance the globalization of litigation against the problems for a defendant who is sued in a foreign jurisdiction.

[29] The Respondents say that there must be a holistic approach to the application so that parties are not considered singularly but all together as part of a single action.

[30] Dealing specifically with this case, the Respondents say that all parties were properly served in accordance with the rules: the Yukon parties served pursuant to Rule 11 and the non-resident parties, pursuant to Rules 13(1)(d) and (j) which provide that such parties may be served without an order if relief is sought against a person domiciled or ordinarily resident in Yukon or the person outside Yukon is a necessary and proper party to a proceeding brought against a person served in Yukon. The Respondents note that Crew underwent a corporate reorganization in December, 2010. This indicates that Crew is quite willing to acknowledge its Yukon status when it is in its interests to do so. As well, since the Yukon is considered an attractive jurisdiction for mining companies to carry on business because of the lack of residence requirements of directors and other benefits, those companies should not be able to avoid legal

liabilities simply because that lack of requirements allows them to argue that there is barely any connection with Yukon.

[31] Dealing with the doctrine of real and substantial connection, the Respondents say that while there must be a nexus, it is not necessary to show that Yukon has the most real and substantial connection: *Bouch v. Penny*, 2009 NSCA 80 at para. 49. The Respondents say that the burden of the proof that they carry is only to show a good arguable case. In this case, the affidavits which set out the events as they occurred in Guinea are sufficient. In looking at whether there is a good arguable case, the defendants should not be considered individually but rather as part of the whole action. To look at the defendants individually runs the risk that the actions are split so that there are multiple actions. That is not in accordance with the principles of orderliness and fairness which underlie consideration of a real and substantial connection. In any event, there are flaws in the Applicants' argument regarding the liability of Crew for the actions of other corporate defendants. Whether or not Crew was the alter ego of other corporations and where that leads in terms of liability are matters for trial. Moreover, there are independent claims against Crew, for example paragraph 50 of the Statement of Claim. The Crew logo is at the bottom of each page of the contract.

[32] With respect to the individual directors and officers, the Respondents admit that the location of the alleged conspiracy is not identified, but that is not a reasonable objection given the modern realities of global commerce. Oral discovery and document production are required to provide those details.

[33] Dealing with *forum non conveniens*, the Respondents point out that the onus rests on the resident defendants to show why a stay should be imposed on a balance of

probabilities. In *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96, the Court noted that "the existence of a more appropriate forum must be *clearly* established to displace the forum selected by the plaintiff" (at para. 38, emphasis in original). Further, in *Spar Aerospace Ltd v. American Mobile Satellite Corp.*, 2002 SCC 78, the court adopted academic commentary that "[t]he starting point should be the principle that the plaintiff's choice of forum should only be declined exceptionally ...": J.A. Talpis and J.-G. Castel, "Interpreting the rules of private international law" in *Reform of the Civil Code*, vol. 5 B, *Private International Law* (1993), at 55, cited in *Spar* at para. 79.

[34] In respect of the choice of forum clause, the Respondents say that the contract provides only a partial context to the action and not all defendants were party to the contract. They also note that the clause does not contain the word "irrevocably" which other forum selection clauses do. Neither does the clause say that it defines exclusive jurisdiction. In *Hayes v. Peer 1 Network Inc.*, 55 C.C.E.L. (3d) 132, (2007) O.J. No. 57 (Ont. Master), the court said that a non-exclusive forum selection clause was simply one factor to consider in the *forum non conveniens* analysis. As well, this clause is ambiguous since it does not identify which court in South Africa.

[35] Finally, the Respondents argue that given the opinion of Mr. Fine, South Africa will not accept jurisdiction. Yukon is the only forum available so that the doctrine of necessity applies.

The Law

[36] As in most cases involving jurisdiction, there are two separate issues that must be addressed. The first deals only with out-of-province defendants. That issue is whether there is a real and substantial connection between the defendant and the

jurisdiction. As pointed out in *Muscutt* at para. 43, that test is a legal rule. It determines whether the court has jurisdiction at all, jurisdiction *simpliciter*. The second issue is whether a court, having jurisdiction *simpliciter* over a defendant, should nevertheless decline to exercise that jurisdiction under principles of *forum non conveniens*. This issue potentially applies to all defendants. It is a discretionary test that focuses upon the particular facts of the case and parties. The most recent analysis of the state of the law on both issues is contained in *Van Breda v. Village Resorts Limited*, 2010 ONCA 84 (currently under reserve in the SCC). At paras. 41 to 45 of the decision, Sharpe, J.A. summarized the decisions leading up to *Muscutt*. At para. 46, he noted that in *Muscutt*, the Ontario Court of Appeal concluded that it was not possible to create a rigid formula to determine whether a real and substantial connection exists, but that flexibility, clarity and certainty were important. From that conclusion, the court in *Muscutt* set out eight factors that could be used to determine whether there was a real and substantial connection. Those factors are

- the connection between the forum and the plaintiff's claim;
- the connection between the forum and the defendant;
- unfairness to the defendant in assuming jurisdiction;
- unfairness to the plaintiff in not assuming jurisdiction;
- the involvement of other parties to the suit;
- the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- whether the case is interprovincial or international in nature; and

- comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[37] Insofar as *forum non conveniens* is concerned, at para. 49 of *Van Breda*, Sharpe, J.A. listed the factors used to assess a claim of *forum non conveniens*, including

- the location of the majority of the parties;
- the location of key witnesses and evidence;
- contractual provisions that specify applicable law or accord jurisdiction;
- the avoidance of a multiplicity of proceedings;
- the applicable law and its weight in comparison to the factual questions to be decided;
- geographical factors suggesting the natural forum; and
- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.

[38] Sharpe, J.A. then revisited the test for real and substantial connection in the context of certain developments including academic commentary on *Muscutt* and the model *CJPTA*. Yukon has enacted the *CJPTA* as S.Y. 2000, c. 7, R.S.Y. 2002, App. A. (not yet proclaimed in force), which I discuss below.

[39] As a result, he set out at para. 109 the following process for determining whether a real and substantial connection exists such that a court has jurisdiction:

- Determine whether the claim falls within the relevant rule permitting service *ex juris* without a court order, which in this case is Rule 13(1) of the Yukon Rules. If the claim falls under the rule, a real and substantial

connection is presumed. If not, the plaintiff has the burden to show that the real and substantial connection test is met.

- At the second stage, he says that the core of the analysis is the connection between the jurisdiction and the plaintiff's claim on the one hand, and between the jurisdiction and the defendant on the other hand.
- The remaining *Muscutt* factors should not be treated independently, having about the same weight, but as general legal principles that inform the analysis of the primary factors;
- Fairness in assuming jurisdiction is a necessary tool but, with the exception of the forum of necessity consideration, fairness should not trump in a case where there is a weak connection.
- The involvement of other parties is relevant where it is asserted as a possible connecting factor or within the *forum non conveniens* analysis;
- If the court would not be prepared to recognize and enforce an extra-provincial judgment against a resident defendant rendered on the same jurisdictional basis, it should not assume jurisdiction against the extra-provincial defendant;
- Whether the case is interprovincial or international in nature and comity, and the standards of jurisdiction, recognition and enforcement prevailing elsewhere should be applied as general principles of private international law that bear on the interpretation and application of the real and substantial connection test;

- The factors to be considered in the *forum non conveniens* analysis should be considered separately and only after the real and substantial connection analysis;
- Where there is no other forum where the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.

[40] As noted above, the *CJPTA* has been passed in the Yukon but not proclaimed. Section 3 of the Act states that this Court has competence over a party on several bases, one being where the person is ordinarily resident in the Yukon (s. 3(d)), and another being where there is a real and substantial connection between the Yukon and the facts on which the proceeding against that person is based (s. 3(e)). Section 7 provides that a corporation is ordinarily resident in the Yukon if it has a registered office or address in the Yukon. Section 10(1) sets out certain circumstances where a real and substantial connection with the Yukon is presumed and also provides that a plaintiff has a right to prove other circumstances that constitute a real and substantial connection. Section 10(2) provides that notwithstanding the presumption contained in s. 10(1) a party may prove that there is no real and substantial connection between the Yukon and the facts upon which the proceeding is based. Section 11 deals with *forum non conveniens*. Section 11(1) provides that the court may decline to exercise its territorial jurisdiction on the ground that "a court of another state is a more appropriate forum" and s. 11(2) sets out the factors to determine if there is a court outside the Yukon which is a more appropriate forum. They are

- the comparative convenience and expense for the parties and their witnesses;

- the law to be applied to issues in the proceedings;
- the desirability of avoiding a multiplicity of proceedings;
- the desirability of avoiding conflicting decisions;
- the enforcement of an eventual judgment; and
- the fair and efficient working of the Canadian legal system as a whole.

Finally, s. 6 gives the court a residual discretion to hear a proceeding even if there is no real and substantial connection if there is no court outside the Yukon where the plaintiff can commence proceedings or the commencement of proceedings outside the Yukon cannot reasonably be required.

Analysis

[41] The modern framework to determine whether a court should accept jurisdiction is not the "dismal swamp, filled with quaking quagmires" that Professor Prosser described in "Interstate Publication" (1953) 51 Mich. L. Rev. 959 at 971. However, it may be helpful to give a summary of my conclusions. First, I find that I have jurisdiction over the two resident defendants. Second, I find that there is no real and substantial connection between the Yukon and the non-resident defendants. Third, the principle of fairness, one of the considerations in the real and substantial connection analysis does not assist the plaintiffs because of the jurisdiction clause contained in the contract. Fourth, there is a more appropriate forum – South Africa. Fifth, given the potential that South Africa would accept jurisdiction, it is not the time for the Yukon to take jurisdiction under the doctrine of forum of necessity.

[42] In considering the issues before me, I see no reason why I should not be guided by the provisions of the Yukon *CJPTA* even though the *CJPTA* has not been

proclaimed. In large measure, it codifies the state of the law and to the extent that it does not, it is the product of significant study of the cases. I have also looked to the analysis in *Van Breda* for guidance.

[43] As noted, s. 3(d) of the *CJPTA* provides that the Court has territorial competence over a defendant who is ordinarily resident in the Yukon at the time of the commencement of the proceeding, and s. 7 provides that a corporation is ordinarily resident in the Yukon if it is registered in the Yukon. As the two Yukon corporate defendants are registered in the Yukon, they are ordinarily resident, and this Court has territorial competence over them.

[44] That takes me to the non-resident defendants. Of the factors set out in s. 10(1), the only one that could possibly provide the basis for a finding of a real and substantial connection is 10(1)(h): "concerns a business carried on the Yukon". It would take a very broad interpretation of that factor to find that it applies in this case. In my view, s. 10(1)(h) does not cover this situation. No defendant is doing business in the Yukon. As a matter of convenience, two defendants are registered in the Yukon. That is not enough. The plaintiff has shown no other circumstances that lead me to conclude that the non-resident defendants have a real and substantial connection to the Yukon.

[45] Although I am using the *CJPTA* for my analysis, following the reformulated analysis developed by Sharpe, J.A. in *Van Breda* I arrive at the same conclusion. First, the only connection between the plaintiff's claim and the Yukon is the fact that two of the corporate defendants are resident in the Yukon. But they are barely resident. They do not do business in the Yukon, they have no assets here, and they have no officers, directors or employees here. Accordingly the connection between the claim and the

Yukon hangs by a thread. Thus, the non-resident defendants have an even more questionable connection with the Yukon. Looking at the connection between the defendants and the Yukon, there is only the bare residence of two defendants. For the other defendants, there is nothing.

[46] Before proceeding further with the *Van Breda* analysis, I must comment on the Respondents' argument that I must take a holistic approach to my analysis. They say that I should not divide the defendants into groups as the Applicants have done. Rather if I can find a connection with the Yukon – and they say it is because of the residence of two defendants – then every defendant is brought along. I agree with the Applicants that that is a classic bootstrapping argument, and it is one I reject. A more legitimate analysis is to look at the substance of the action and the parties as was done in *Gajraj* where Sharpe, J.A. used the phrase "core of the claim" in rejecting an argument like the argument made here by the Respondents. Here, except for the civil conspiracy claim, the substance of the claim occurs either in Guinea or England and as said above, the parties are all unconnected to the Yukon except the bare residence of two defendants. The civil conspiracy claim is so devoid of particulars as to merit no consideration as the additional factor to found jurisdiction for the non-resident defendants in the Yukon.

[47] *Van Breda* tells me that the above two considerations, namely the connection between the jurisdiction and the plaintiff's claim and the jurisdiction and the defendants, are the core of the analysis. Because they create such a tenuous connection with the Yukon, I turn to the remaining factors to see if there is anything that fortifies the connection. Of those factors, only two are relevant: fairness and the lack of another forum where the plaintiff can seek relief. The issue of forum of necessity is dealt with at

the end of this judgment. Fairness in fact works against the plaintiffs when I consider the jurisdiction clause.

The Jurisdiction Clause

[48] As noted, the parties have agreed to submit to the jurisdiction of the courts of South Africa. Assuming for the moment that this clause is properly construed as an *exclusive* jurisdiction clause, and assuming also that this Court otherwise does have jurisdiction to hear this matter, such an agreement would still be insufficient to oust the jurisdiction of this Court: *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*, 65 A.R. 271, 41 Alta. L.R. (2d) 5 (C.A.) at para. 4. However, in such a case the Court would exercise its discretion to stay any action launched here in favour of the selected forum unless the plaintiff could show "strong cause" not to do so: *Pompey*.

[49] The application of the strong cause test places a stringent burden on the plaintiff. It generally arises only where the forum selection clause provides that *all* disputes arising under the contract be referred to the selected forum and to no other, i.e., where the jurisdiction of the foreign court is exclusive. Nevertheless, the party seeking to avoid even a non-exclusive jurisdiction clause will still face a high onus: Stephen G.A. Pitel & Nicholas S. Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 127-8; Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, 6th ed. by Janet Walker, loose-leaf (consulted on 13 September 2011), (Markham, Ont.: LexisNexis, 2005) at §13.5(c).

[50] No magic words are required for an exclusive jurisdiction clause; whether a jurisdiction clause is exclusive or not is a question of interpretation of the contract. "[T]he true question is whether on its proper construction the clause *obliges* the parties to resort to the relevant jurisdiction, irrespective of whether the word 'exclusive' is used.": Sir Lawrence Collins, ed., *Dicey, Morris and Collins on The Conflict of Laws*,

14th ed. (London, UK: Sweet & Maxwell, 2006) at §12–092. This is not as simple as it may appear. Considering all the circumstances, it may be the case that the clause grants jurisdiction to the named forum but not to the exclusion of all others. This interpretation is especially plausible if the named forum would not obviously otherwise have had jurisdiction. On the other hand, "[i]t may be that, on its true construction, though the court was given [what appears on its face to be] non-exclusive jurisdiction, the parties agreed that if either were to invoke it, the other would submit to the jurisdiction of the named court for the sole determination of the dispute.": *ibid.*

[51] For the purpose of the present analysis, the forum selection clause, whether exclusive or not, is a useful indication of a connection to South Africa. This, in turn, assists the consideration of any unfairness that might accrue to the Plaintiffs in requiring them to litigate there, and the related question of whether the Yukon is the only available jurisdiction.

[52] Dicey, Morris & Collins note that in the face of even a non-exclusive jurisdiction clause, "the fact that a court was contractually chosen by the parties will be taken as clear evidence that it is an available forum ..." (at §12–093; see also Castel & Walker at §13.5(c)). This inference is even easier to make given the evidence that the Respondents had resisted changing the selected forum to England instead of South Africa, and that the Respondents had clear reasons for taking this position that were related to the superior suitability of South Africa as a forum for resolving disputes under the contract.

[53] On June 30, 2005 the Hague Conference on Private International Law concluded the *Convention on Choice of Court Agreements*, 44 I.L.M. 1294, which provides that in

the case of a valid exclusive choice of forum clause the chosen court must hear the dispute and all others must refrain from hearing it. The Convention provides further that a choice of court agreement is exclusive in the absence of an express provision otherwise. So far the Convention has been signed by the EU and the USA, and acceded to by Mexico. Canada has not yet ratified the Convention but is likely to do so: Pitel & Rafferty at 129.

[54] Though South Africa is a member of the Hague Conference (and was at the time the Convention was concluded), it is, of course, impossible to know when or if South Africa will ratify the Convention. However, the conclusion of such a convention is further evidence of an approach to litigation around the world that is ever less isolationist. This is consistent with the observations of Mr. Dodson regarding the trend in South African courts toward recognizing the need to accommodate globalisation.

[55] In the current environment and on the evidence before me I am unable to say with any certainty that the courts of South Africa will decline jurisdiction, and it would be presumptuous of me to conclude that they will.

[56] The jurisdiction clause in the contract provides evidence of a strong link to South Africa, which is further strengthened by the arbitration provisions that also point to South Africa. Considering these connections together with the other factors that point toward South Africa, including that key witnesses are located in Guinea, that the facts giving rise to the action occurred in Guinea, that some attempts to resolve the matter occurred in Guinea, and given the relative proximity of Guinea to South Africa, I cannot say that it would be unfair to the Plaintiffs not to assume jurisdiction.

Forum non conveniens

[57] Section 11(2) of the *CJPTA* sets out the factors to consider in deciding whether there is a "more appropriate forum" than the Yukon. The first is convenience and expense for the parties and their witnesses. No witness resides in the Yukon. They are in Europe, Africa and perhaps Delaware. For the witnesses, South Africa is likely more convenient than the Yukon. The law to be applied is the law of South Africa. I have found that there is no real and substantial connection between the Yukon and most of the defendants so that if the Yukon action proceeds there will be a multiplicity of proceedings potentially with conflicting decisions – one in the Yukon for the resident defendants and another somewhere else for the non-residents. No one has suggested that a South African judgment could not be enforced in the Yukon. Finally, given the scarcity of resources available to our courts, permitting complex litigation to proceed where there is such a tenuous connection to the Yukon does not promote a fair and efficient legal system. Using the *CJPTA* factors, there is a more appropriate forum – South Africa.

[58] The common law considerations include another factor: Whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage. No such advantage was proposed by the plaintiff.

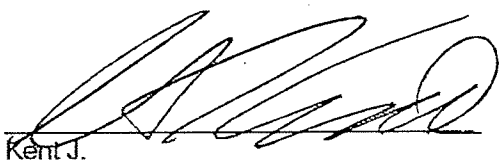
Forum of Necessity

[59] Where there is no other forum where a plaintiff could reasonably seek relief, a court has the residual discretion to assume jurisdiction based on concerns related to

access to justice, despite the lack of a real and substantial connection with the forum: *Van Breda* at paras. 54, 66, 100; *CJPTA*, s. 6.

[60] As I have already concluded above in connection with the analysis related to fairness generally, I cannot say that the courts of South Africa will refuse to hear this matter, nor that, given the connections to South Africa, it would be unreasonable to require the Plaintiffs to commence proceedings there. The parties may also be able to litigate in England. Consequently, this Court declines, at this time, to assume jurisdiction as a forum of last resort. If in the future the courts of South Africa do, in fact, decline to assume jurisdiction, then the time might be right for the Plaintiffs to make this argument.

[61] In the result, the Application is granted to the extent that this action is stayed pending any application to remove the stay because the plaintiffs have no other forum in which to litigate.



Kent J.