Citation: *Tincup Wilderness Lodges Ltd. v. Panabode International Ltd.*, 2014 YKSM 9

Date: 20141009
Docket: 13-S0105
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before Her Honour Chief Judge Ruddy

TINCUP WILDERNESS LODGES LTD.

Plaintiff/Respondent

v.

PANABODE INTERNATIONAL LTD.

Defendant/Applicant

Appearances:
Bhreagh D. Dabbs — Counsel for the Plaintiff
Rauvin Manhas — Appearing on behalf of the Defendant

RULING ON APPLICATION
(Striking of Claim and jurisdiction)

[1] The Plaintiff, Tincup Wilderness Lodges Ltd. ("Tincup"), is a Yukon-based company that entered into a contract with the British Columbia-based Defendant, Panabode International Ltd. ("Panabode"), for the purchase of materials required to build a fishing lodge at a remote site in the Kluane Lake area. The background of the dispute will be set out in greater detail below, but this preliminary application was brought by Panabode asking this Court to either strike the application or, in the alternative, to decline jurisdiction on the basis that the matter is more properly heard in

British Columbia.

BACKGROUND

[2] Over the course of several months in 2012 and early 2013, the Plaintiff and the Defendant entered into a contract whereby Tincup purchased wood and other construction materials from Panabode. The contract had both oral and written components, and the business was transacted by email, phone, and in-person at Panabode's offices near Vancouver, British Columbia. In addition to providing the materials, the parties agreed that Panabode would package them and have them sent by road to Mile 1118 Alaska Highway, where Tincup would retrieve them. Tincup would then use a helicopter to transport them from this location to the site of the fishing lodge. As such, the bundling of the material assumed great importance, as the helicopter could not transport bundles weighing in excess of 2,500 pounds.

[3] Tincup alleges that Panabode breached the terms of the contract by either packaging the material into bundles that weighed in excess of 2,500 pounds or by poorly packaging the material such that it arrived soaking wet and weighing more than 2,500 pounds per bundle. Whatever the case, Tincup is seeking damages for costs it incurred in repackaging the bundles so that the material could be helicoptered to the building site. This includes labour and equipment costs as well as additional flight time costs. The amount claimed is $25,000.

[4] Panabode's position is that the packaging and handling of the materials did not form part of the contract between the parties, and it denies any liability on this basis.

ISSUES

[5] As indicated, the Defendant, Panabode, has brought two pre-trial applications. The first seeks to strike the Claim on the basis that there is no "*prima facie* case or claim against the Defendant". The second raises questions with respect to the appropriate forum for this claim. I have reframed the first application to be more consistent with the test to strike applied in this jurisdiction, and the issues will be addressed as follows:

1. Should the Plaintiff's amended Claim be struck on the basis that it discloses no reasonable claim?
2. If no, should this Court decline jurisdiction to hear the matter on the basis that it is more appropriately adjudicated in British Columbia?

ANALYSIS

Issue 1 – Should the Plaintiff's amended Claim be struck on the basis that it discloses no reasonable claim?

[6] I find that the Claim should not be struck.

[7] The *Small Claims Court Act,* RSY 2002, c. 204 and *Regulations* O.I.C. 1995/152, as amended by O.I.C. 2011/04 are silent about the test to strike pleadings. However, s. 1(2) of the *Regulations* says that where matters are not provided for in the *Regulations*, "the practice may be determined with reference to the Supreme Court Rules". Counsel for Tincup filed the decision of Gower J. in *McClements v. Pike*, 2012 YKSC 84, which considers the requirements for an application under Supreme Court Rule 20(26) ("Scandalous, frivolous or vexatious matters"). Rule 20(26) section reads:

> At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[8] At para. 4 of *McClements,* Gower J. notes that when hearing an application to strike, the court must assume that all the facts alleged in the claim are true, and that striking should only be done in plain and obvious cases where the claim is certain to fail.

[9] I cannot find that Panabode's application satisfies this test. The Plaintiff's facts as set out in the Statement of Claim raise triable issues, and success will have to be based on findings of credibility, the weighing of evidence and the interpretation of the contract formed between the Parties. It is not plain and obvious that the Claim is doomed to fail.

Issue 2 – Should this court decline jurisdiction to hear the matter on the basis that it is more appropriately adjudicated in British Columbia?

[10] Panabode asserts that British Columbia is the proper forum in which to adjudicate Tincup's claim. Its primary argument is that the contract between Tincup and Panabode was "F.O.B. [Free On Board] shipping point" or "F.O.B. origin", and the title and ownership was transferred to Tincup in Richmond, British Columbia. The contract

was therefore formed and completed in British Columbia. Panabode relies on *Pan Pacific Specialties Ltd. v. Shandong Machinery and Equipment I/E Corp.,* 1999 CanLII 5755 (B.C.S.C.) and *Davidson v. The Anchorage Incorporated* (1980), 23 B.C.L.R. 352 (S.C.)., *Canadian International Marketing Distributing v. Nitsuko Ltd.* (1990), 68 D.L.R. (4th) 318 (B.C.C.A.), among other cases.

[11] Tincup opposes this application on the basis that Panabode has attorned to the jurisdiction of the Yukon Small Claims Court by filing a reply, an amended reply, and this application. Tincup also says this Court is the appropriate court to hear the matter.

[12] The law regarding jurisdiction and *forum non conveniens* is set out by the Supreme Court of Canada in *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17. Some jurisdictions have a *Court Jurisdiction and Proceedings Transfer Act* (CJPTA) that provides a legislated framework for the assumption of jurisdiction, but while the Yukon has passed equivalent legislation, it has not yet been declared in force.

[13] *Van Breda* breaks down the forum question into two stages: 1) whether the court can assume jurisdiction given the subject matter ("jurisdiction *simpliciter*" or "original jurisdiction"); and 2) whether, despite having jurisdiction, the court should decline to hear the matter based on the doctrine of *forum non conveniens.*

[14] While neither side took the position that the Yukon Small Claims Court was without jurisdiction to hear the dispute, I asked counsel to address this question on the basis the Purchase Agreement between Tincup and Panabode states that the contracts "shall be governed by the Laws of British Columbia". I also asked for further

submissions about jurisdiction *simpliciter* on the basis of the framework set out in *Van Breda*.

[15] Before considering the aforementioned issues, I should note that Panabode's Notice of Application specifically asks for an order transferring this matter to British Columbia. I am without jurisdiction to do that. I cannot order another court to adjudicate this dispute. Rather, I can either find that the Yukon Small Claims Court has no jurisdiction to hear the case or I can stay the proceedings on the basis that the Yukon is not the appropriate forum. If I do either of those two things, the Plaintiff would have to take necessary steps to ensure that the matter is commenced and heard in British Columbia.

i) Does the Small Claims Court of Yukon have jurisdiction *simpliciter* to hear this case?

"Governed by the Laws of British Columbia"

[16] While I was initially concerned about my ability to apply the laws of B.C. to a dispute, counsel for Tincup has convinced me of my authority to do so.

[17] Under s.1 of the *Small Claims Court Act,* the Small Claims Court shall be presided over by a judge of the Territorial Court. The *Territorial Court Act,* RSY 2002, c. 217 sets out the following jurisdiction for judges:

> 3(1) A judge has jurisdiction throughout the Yukon to exercise all the power conferred on, and perform all the duties imposed on a judge, a justice or two or more justices sitting together, or a provincial court judge by or under an enactment of the Yukon or Canada.

[18] The Territorial Court is considered a "court" for the purposes of the *Evidence Act,* RSY 2002, c. 78 and is therefore caught by its provisions. Pursuant to s. 30 of the *Evidence Act* ("Judicial notice of statutes"):

> Judicial notice shall be taken of
>
> (a) Acts of the Imperial Parliament;
>
> (b) Acts of the Parliament of Canada;
>
> (c) ordinances made by the Governor in Council of Canada;
>
> (d) Acts of the legislature of, or other legislative body or authority competent to make laws for, any province; and
>
> (e) Acts and ordinances of the legislature of, or other legislative body or authority competent to make laws for, any country of the British Commonwealth including the date of coming into force of any such Act or ordinance.

[19] As a Territorial Court judge, I can exercise the powers and perform the duties required under territorial legislation, including s. 30 of the *Evidence Act*. I am therefore required to take judicial notice of British Columbia law where a matter calls for it.

[20] It is not difficult to prove law from another jurisdiction (*Sittler et al. v. Conwest Exploration Co. Ltd. et al. (No. 2),* [1972] Y.J. No. 3 (S.C.)), and I agree that, while unusual for this Court, applying such law would not present great difficulty, especially in the context of the law of contracts which draws on shared common law precepts. In addition, I accept that provincial courts in other jursidictions apply extra-provincial legislation, and counsel has provided me with *Moores v. Doug's Recreation Centre Ltd.*, [2005 N.J. No. 329 (P.C.) and *Beachwood A. Sound Pacific Resources Development v. Ronquillo,* 1996 BCPC 9, to illustrate this.

Van Breda – jurisdiction simpliciter

[21] The first stage of *Van Breda* asks the plaintiff to establish the existence of a presumptive connecting factor linking the subject-matter of the litigation to the forum. While the presumption flowing from the identified factor can be rebutted, the absence of any such factor means that the court should not assume jurisdiction (para. 93).

[22] Presumptive connecting factors are "objective factors that connect the legal situation or the subject matter of the litigation with the forum" (para. 82). Concerns about order, efficiency and fairness may influence reliance on certain presumptive connecting factors, but these concerns do not govern the assumption of jurisdiction *simpliciter* (para. 84).

[23] In *Van Breda,* which was decided in the context of tort rather than contract law, LeBel J. sets out four presumptive factors that would put a tort dispute within the jurisdiction of the courts in a given province. The presence of one or more of these factors triggers the rebuttable presumption that a court is acting within its jurisdiction (paras. 80-81). The factors he enumerated in that context are recapped at para. 90:

(a) the defendant is domiciled or resident in the province;

(b) the defendant carries on business in the province;

(c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.

[24] It is clear from *Van Breda* that the presence of the plaintiff in the jurisdiction is not, on its own, a presumptive factor for the assumption of jurisdiction (para. 86) and neither is the location where damage was sustained (para. 89).

[25] While *Van Breda* provides a non-exhaustive list of presumptive connecting factors applicable in a tort context, those factors do provide guidance with respect to the factors relevant in a breach of contract context.

[26] The enumerated factors are however, relatively limited, and counsel for Tincup pointed to LeBel J.'s observation that presumptive connecting factors will generally relate to situations in which courts allow for out-of-jurisdiction service. In this respect, the *Small Claim Court Regulation* s. 22(1)(b) is fairly restrictive, in that out-of-jurisdiction service can only be arranged where "the transaction or event resulting in the claim took place in Yukon". The Supreme Court's Rule about extra-jurisdictional service is far more permissive; according to Rule 13(1)(g) and (o), service on a party outside Yukon is permitted where a contract is breached in Yukon, regardless of where it was made, and when the claim arises out of the goods or merchandise sold or delivered in the Yukon.

[27] The breadth of the jurisdiction assumed by the Yukon Supreme Court is overly broad for application here, in my view, given the significantly more limited application of s. 22(1)(b) of the *Small Claims Court Act*, the limited category of presumptive connecting factors set out in *Van Breda* and the cautions given in *Van Breda* about the possibility of difficult issues arising if there is reliance on connecting factors such as the

location of damage being sustained and the location of the plaintiff, which are essentially the factors that Tincup is relying on.

[28] The Alberta case of *Bansal v. Ferrara Pan Candy Co.,* 2014 ABQB 384, para. 31 found the following presumptive connecting factors applicable in a contract dispute. They more closely mirror the ones adopted by the Supreme Court in *Van Breda* and I adopt them here:

> (a) the defendant is resident in the Yukon;
>
> (b) the defendant carries on business in the Yukon;
>
> (c) a contract or alleged contract was made, performed or breached in the Yukon; and
>
> (d) a tort connected with the contract was committed in the Yukon.

[29] Applying these factors to the case at bar, with respect to (a), the Defendant is resident in British Columbia.

[30] With respect to (b), the Court in *Van Breda* noted that "[t]he notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction" (para. 87). There is no evidence before me to suggest that Panabode had this presence in the Yukon. The filed material indicates that their offices and warehouses are located in the lower mainland area of British Columbia. Further, the contracts at issue were signed by the Plaintiff in British Columbia, and it appears the

Plaintiff took a trip specifically for the purpose of meeting the Defendant, indicating the Defendant had no presence in the Yukon.

[31] With respect to (c), the written contracts between Tincup and Panabode were signed when the Plaintiff attended at Panabode's offices in British Columbia. To the extent that there were other, less formal, contracts formed during the relationship by electronic means, the law seems to be that the contract is usually considered made in the jurisdiction where acceptance is received, in this case, British Columbia (see *Trillium Motor World Ltd. v. General Motors of Canada Ltd.,* 2014 ONCA 497).

[32] This suit is based on an alleged breach of contract, specifically with respect to terms agreed on regarding the shipping of the material purchased by Tincup. Panabode denies that the contracts dealt with packaging or shipping, but in the alternative, takes the position that the Free On Board nature of the transaction means that once the materials left the Panabode premises, they were the responsibility of Tincup. This may well be an issue for trial, but I do consider that even if Panabode bears responsibility for the overweight packages and/or the sodden state of the material when it arrived at Mile 1118 on the Alaska Highway, the conduct that would have caused this state of affairs also occurred in British Columbia, at the time the materials were packed up and loaded for transport.

[33] While it is true that Tincup suffered its damages in the Yukon, I note again that the court in *Van Breda* specifically rejected this as a presumptive connecting factor in the tort context (para. 89).

[34] I find that the Plaintiff has not satisfied me that there is a presumptive connecting factor present that would give the Yukon Small Claims Court jurisdiction *simpliciter* over this contract dispute.

ii) Attornment

[35] Having found that the Small Claims Court does not have jurisdiction *simpliciter* over this dispute, it is not clear to me that the Defendant can attorn to its jurisdiction.

[36] However, if I am wrong on the question of jurisdiction, I would nonetheless allow Panabode to make its argument about forum.

[37] I accept that the common law around attornment has historically been relatively rigid in its application. However, I also find that, as stated in *Simpson Performance Inc. v. Simpson,* 2011 ONSC 2352, a case filed by Panabode, attornment is "a question of fact to be determined on a case by case basis" (para. 15). The cases filed by both parties suggest to me that I do not have to conclude that as soon as there is a reply filed on the merits of the case, I must find that a defendant has attorned to the jurisdiction. Indeed, in the cases filed, attornment seems to have been found after the defendant actively participated in the discovery process. I also note paragraph 21 in *Stoymenoff v. Airtours PLC,* [2001] O.J. No. 3680 (S.C.), which implies that the concern in the law around attornment is with ensuring the plaintiff does not incur or spend unnecessary time, energy and expense proving the merits of its case, only to have jurisdiction attacked by a defendant who has lost on those merits. Here, apart from the pleadings filed and a couple of associated affidavits, no steps have been taken to address the

matter on its merits. This jurisdictional application has been timely. I also understand that the issue of jurisdiction was raised by counsel formerly retained by Panabode as early as February 2014, even though this application was not filed until August 8, 2014.

[38] As well, I have a concern with the rigid application of the law of attornment in a Small Claims Court context. This court is intended to be a forum in which non-legally trained individuals can represent themselves; a 'people's court' if you will. There is no clear or easily accessible information about the jurisdictional implications of filing a reply in the *Act*, the *Regulations*, or in the materials available to help self-represented litigants. Indeed, the information provided when a statement of claim is served suggests that a defendant must file a reply or risk default judgment. If, after taking those preliminary steps, a defendant considers that their matter is better heard elsewhere, the process should not impose a rigid barrier to that.

[39] As with *Simpson Performance* and *Stoymenoff*, I think the determination should be made on the basis of facts and with a consideration of the expense, time and energy spent by the Plaintiff on proving the merits of its case. I am, therefore, not of the view that the Defendant is foreclosed from challenging the jurisdiction of this court on the basis of attornment.

iii) *Forum non conveniens*

[40] Again, it is my view that this court does not have jurisdiction *simpliciter* in this dispute. However, if I have erred, I would nonetheless find that British Columbia is a more appropriate forum for this dispute.

[41] In this second stage of the jurisdictional analysis, Panabode is expected to identify another forum that has an appropriate (real and substantial) connection to the dispute and demonstrate why that alternative forum is to be preferred (*Van Breda,* para. 103).

[42] I am satisfied on the basis of the presumptive connecting factors set out above that British Columbia has the necessary degree of connection to this dispute. Panabode is resident there, operates its business from there, the contract at issue was entered into there, and the packaging of material at the centre of this dispute took place there.

[43] Panabode must also satisfy me why their forum should be preferred. It is clear from the number and strength of the presumptive connecting factors that British Columbia has a very real and very substantial connection to this claim, and indeed one that is much stronger than any Yukon connection.

[44] At this stage of the analysis, the court should also consider things like comparative costs to the parties and witnesses in the litigation, the law to be applied, the avoidance of multiple proceedings, the avoidance of conflicting decisions, enforcement, and the 'fair and efficient working of the Canadian legal system as a whole' (*Van Breda,* para 105).

[45] Applying these considerations to this case, I find that British Columbia is the more appropriate forum.

[46] With respect to comparative costs, the reality is that one of these parties will bear

greater expense than the other, depending on where this matter is to be heard. Neither of the two jurisdictions would, in my view, offer a global savings. Nor am I satisfied that the costs either party will have to bear should this matter be heard outside of the jurisdiction in which they reside would be substantially different.

[47] As considered above, the law to be applied is the law of British Columbia, which B.C. courts have far more experience interpreting and applying. The other factors in this list appear to me to be neutral, since there are not likely to be multiple proceedings arising from this set of circumstances.

CONCLUSION

[48] In the result, the Defendant's application to strike the Plaintiff's claim is denied, but this Court declines to accept jurisdiction to hear the Plaintiff's claim on the basis the Yukon Small Claims Court lacks jurisdiction *simpliciter*, and the Province of British Columbia is the appropriate forum for this matter to be heard.

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RUDDY C.J.T.C.