IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Krahn Engineering Ltd. v. Bit,* 2024 BCSC 1069

Date: 20240619
Docket: S241481
Registry: Vancouver

Between:

Krahn Engineering Ltd.

Plaintiff

And

Gino Bit

Defendant

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for the Plaintiff:	S. Shuchat
Counsel for the Defendant:	M. Dhillon
Place and Date of Hearing:	Vancouver, B.C. May 15, 2024
Place and Date of Judgment:	Vancouver, B.C. June 19, 2024

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Introduction

[1] This is an application under the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*]. The defendant, Gino Bit, seeks an order striking, dismissing or staying this action on the basis that this Court does not have jurisdiction over him in respect of the claims made by the plaintiff, Krahn Engineering Ltd. ("Krahn" or the "company") or, alternatively, on the basis that the Court ought to decline its jurisdiction over him.

Background

[2] In the underlying action, Krahn alleges that Mr. Bit breached his fiduciary and contractual obligations while serving as its President and Chief Executive Officer ("CEO").

[3] Krahn hired Mr. Bit in September 2014 as its Vice President of Operations – Alberta. At that time, Dave Krahn, the company's founder, prepared and executed a document entitled "Letter of Intent" (the "LOI Document") on behalf of Krahn. The document was executed by Mr. Bit on his own behalf.

[4] In 2018, Mr. Bit was promoted to the position of President and CEO of Krahn.

[5] Mr. Bit's employment with Krahn was terminated by letter on November 29, 2023.

[6] Krahn commenced this action on March 1, 2024, and Mr. Bit filed a Jurisdictional Response on March 14, 2024.

Framework of Analysis and Issues

[7] The *CJPTA* codifies the circumstances in which the Supreme Court of British Columbia has territorial competence over a matter (ss. 3 and 10), and the factors to be considered in determining whether the Court ought to decline to exercise its territorial competence on the ground that a court of another state is a more appropriate forum in which to hear the proceeding (s. 11). This latter issue is historically known as the "*forum non conveniens*" analysis.

[8] Where there is an alleged forum selection clause, it should be considered distinctly from the *forum non conveniens* analysis. In *Viking Air Ltd. v. Aevex Aerospace, LLC*, 2024 BCSC 502 [*Viking*], this Court held:

> [10] If a forum selection clause applies to the dispute, then the decision whether to exercise territorial competence is not governed by s.11 of the *CJPTA*, but by the common law pertaining to forum selection clauses, including the "strong cause" test: *Douez v. Facebook, Inc*., 2017 SCC 33 [*Douez SCC*] at paras. 17, 18, 20, 22.

[9] This application gives rise to the following issues:

a) whether this Court has territorial competence over Mr. Bit in respect of Krahn's claims;

b) if so, whether it ought to decline to exercise its territorial competence; and

c) whether a forum selection clause applies in any event.

Discussion

Territorial Competence

Legal Principles

[10] Section 3 of the *CJPTA* establishes this Court's territorial competence:

> 3 A court has territorial competence in a proceeding that is brought against a person only if
>
> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction,
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
>
> (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
>
> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[11] Pursuant to ss. 3 and 10 of the *CJPTA*, Krahn has the burden of establishing that this Court has territorial competence over Mr. Bit with respect to the claims it advances, but the threshold for doing so is "not high": *Canadian Olympic Committee v. VF Outdoor Canada Co*., 2016 BCSC 238 at para. 23, citing *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 100 [*Van Breda*]; see e.g. *Zhao v. Zhou*, 2019 BCCA 12 at para. 16.

[12] Krahn must show that it has an arguable case that the facts it relies upon can be established. In *Canadian Olympic Committee*, the Court held:

> [24] … If the defendant tenders evidence that challenges the plaintiff's jurisdictional facts or to demonstrate that the plaintiff's claim is tenuous or without merit, the plaintiff is required to adduce evidence that satisfies the court that it has a good, arguable case that the contentious facts can be established (*Stanway* at para. 70; *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 35 (*Purple Echo Productions*); *Right Business Ltd.* at para. 44; *Original Cakerie* at para. 22). The burden on the plaintiff to show an arguable case in the circumstance where the defendant presents evidence will be discharged if there are facts, alleged or deposed, which, if true, would provide a foundation for jurisdiction (*Purple Echo Productions* at para. 34; *Original Cakerie* at para. 23; *JTG Management* at para. 34). The court is not going to determine whether the facts are true: the task for the plaintiff is to show an arguable case that they can be established (*Purple Echo Productions* at para. 34; *Fairhurst* at para. 20).
>
> [Emphasis added.]

[13] Section 3 of the *CJPTA* lists five ways in which a court has territorial competence in a proceeding. Four of the ways are clearly inapplicable to this case. The question in respect of territorial competence in this action is whether there is a real and substantial connection between this province and the facts on which the proceeding is based.

[14] In this regard, s. 10 of the *CJPTA* provides that a real and substantial connection between British Columbia and the facts on which the proceeding is based is presumed to exist in twelve different circumstances. Krahn cites the circumstances which are described in section 10(e), (g) and (h):

> 10 … a real and substantial connection between British Columbia 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 British Columbia,
>
> …
>
> (g) concerns a tort committed in British Columbia, [or]
>
> (h) concerns a business carried on in British Columbia…

[15] I observe that although Mr. Krahn deposes that the company's head office is in Abbotsford, British Columbia, and the company is incorporated there, that is not, on its own, a sufficient connecting factor. Absent other considerations, the plaintiff's presence in the jurisdiction will not, on its own, create a presumptive relationship between the forum and either the subject matter of the litigation or the defendant: *Van Breda* at para. 86.

Application

[16] The key evidence relevant to this province's territorial competence is Krahn's evidence regarding its operations in British Columbia and Mr. Bit's role as CEO over the entirety of Krahn's operations.

[17] A distinction ought to be made between Mr. Bit's tenure as Vice President of Operations – Alberta between 2014 and 2018, and as President and CEO between 2018 and 2023. In his former position, Mr. Bit's title and the LOI Document suggest that the bulk of his responsibilities lay only in Alberta. However, it seems clear that in his more recent position as President and CEO, Mr. Bit's responsibilities encompassed the entirety of Krahn's business.

[18] Krahn's claim focusses on the time during which Mr. Bit was President and CEO. It pleads at para. 18 of the notice of civil claim: "Notwithstanding Mr. Bit's promotion in 2018, by in or around late 2019 or early 2020 his performance began to decline".

[19] Mr. Krahn deposes that all of Mr. Bit's administrative and finance team members worked in the Vancouver and Abbotsford offices, and that most of the

employees who reported to Mr. Bit were in those offices. Mr. Krahn also deposes that 77 people in the "Krahn Group" worked out of offices in British Columbia, while approximately 23 were in Edmonton, Alberta.

[20] By contrast, Mr. Bit deposes that at all material times during the course of his employment, he resided in Edmonton, and that he performed "substantially all" of his employment duties "from Edmonton". He also deposes that the majority of staff who reported to him were based in Alberta.

[21] He deposes that prior to the COVID-19 pandemic, he travelled to the Krahn Group's Vancouver office approximately every two weeks and spent two days in British Columbia each time, but that those trips became increasingly infrequent. He refers to his decision to hire a separate Vice President of Finance for Krahn "so there would be leadership support in the Vancouver office".

[22] It is clear from this brief summary of the parties' positions that the evidence is conflicting. In particular, the evidence is directly conflicting about whether the majority of the staff who reported to Mr. Bit were located in Alberta or British Columbia. As a result, this Court is not able to reach any definitive conclusions on these issues based on the evidence.

[23] However, as stated above, the role of the chambers judge on a jurisdictional application is not to determine whether the facts supporting a claim of territorial competence are true. Rather, the plaintiff is only required to show that there is an arguable case that those facts can be established: *Canadian Olympic Committee* at para. 24.

[24] In my view, based on the evidence described above, Krahn has established an arguable case that the company carried on business in British Columbia (as well as in Alberta), and that Mr. Bit's contractual obligations were, to a substantial extent, to be carried on in British Columbia. The adjective "substantial" means "of real importance, value, or validity," "of large size or amount," and "having substance, real": The Concise Oxford Dictionary of Current English, 9th ed.

[25] For these reasons, there is a real and substantial connection between this province and the facts on which the proceeding is based, and this Court has territorial competence over Krahn's claims within the meaning of s. 3 of the *CJPTA*.

The Forum Selection Clause

[26] There is a forum selection clause in the LOI Document (the "Forum Selection Clause") that reads as follows:

> This Agreement shall be governed by and construed in accordance with the laws of the Province of Alberta and the laws of Canada applicable in that Province and shall be treated, in all respects, as a Albertan contract. Each of the Parties agrees that any action or proceeding related to this Agreement or the transactions contemplated herein may (but need not) be brought in any court of competent jurisdiction in the Province of Alberta, and for that purpose hereby attorns and submits to the jurisdiction of such Alberta court.

[27] The parties disagree about whether the LOI Document is a binding contract. For the purposes of this application, and without intending to bind subsequent finders of fact in this proceeding, I accept that the parties at least agreed to the Forum Selection Clause. I note that the first page of the LOI Document provides that "this Letter of Intent is intended to outline the general parameters of an Employment Agreement between the Company and the Vice President of Operations". As stated above, both parties signed the LOI Document.

Legal Principles

[28] The law on forum selection clauses is set out in *Viking* at paras. 23 and 24, citing *Douez v. Facebook, Inc.*, 2017 SCC 33 at paras. 20, 28–30. Where a forum selection clause is "valid, clear and enforceable" and "applies to the cause of action before the court", the party seeking to litigate in a jurisdiction different from the forum selection clause must show "strong reasons why the court should not enforce the forum selection clause": *Douez* at paras. 28–29.

[29] However, these principles apply only to *exclusive* forum selection clauses. In *Hydro Aluminium Rolled Products GmbH v. MFC Bancorp Ltd.*, 2020 BCCA 295 [*Hydro Aluminium*], the Court of Appeal held:

> [23] … I do not agree that the strong cause test governs in this case. That common law test applies to contracts with *exclusive* forum selection clauses, but the clause in the Guarantee is not of that kind. It is, rather, a *non-exclusive* forum selection clause. Non-exclusive forum selection clauses lack "the force and clarity required to engage the rule" that a party must show strong cause to override the forum the parties contracted to use: *Schleith v. Holoday* (1997), 1997 CanLII 3606 (BC CA), 31 B.C.L.R. (3d) 81 at paras. 10 and 12 (C.A.); *Douez v. Facebook, Inc.,* 2017 SCC 33 at paras. 18–22. In short, the judge correctly determined that the framework in s. 11 of the *CJPTA* governed the exercise of his discretion.
>
> [Emphasis in original.]

[30] In *Baran v. Pioneer Steel Manufacturers Limited*, 2021 BCSC 491 at para. 31, citing *BC Rail Partnership v. TrentonWorks Ltd.*, 2003 BCCA 597 at paras. 12–13, 18–20, 22), Justice Majawa held that, "when determining whether a forum selection clause is an 'exclusive clause' or a 'non-exclusive clause', the standard principles of contract interpretation apply. Courts must assess whether the clause is intended by the parties to be an exclusive jurisdiction clause when objectively interpreted in its commercial context".

Application

[31] In my view, it is clear that the Forum Selection Clause is not exclusive. This is because the clause expressly states that "any action or proceeding related to this Agreement or the transactions contemplated … *may (but need not)* be brought in any court of competent jurisdiction in the Province of Alberta" (emphasis added). By this clause, the parties did not intend that actions related to Mr. Bit's employment could be brought *exclusively* or *only* in the courts of Alberta.

[32] For these reasons, the Forum Selection Clause does not engage the strong cause presumption arising from an exclusive forum selection clause, and it does not operate on its own to require this case to be determined in the Alberta courts.

[33] As in *Hydro Aluminium,* the Court's task is to turn next to the *forum non conveniens* test as codified under s. 11 of the *CJPTA*. As will be discussed below, the Court is entitled to consider the Forum Selection Clause as part of that analysis.

Forum Non Conveniens

Legal Principles

[34] Section 11(1) of the *CJPTA* provides that "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".

[35] Further, s. 11(2) provides:

> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> > (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
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> > (b) the law to be applied to issues in the proceeding,
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> > (c) the desirability of avoiding multiplicity of legal proceedings,
> >
> > (d) the desirability of avoiding conflicting decisions in different courts,
> >
> > (e) the enforcement of an eventual judgment, and
> >
> > (f) the fair and efficient working of the Canadian legal system as a whole.

[36] On a *forum non conveniens* assessment, the party seeking a stay based on *forum non conveniens* must show that the alternative forum is *clearly* more appropriate: *Van Breda* at para. 108. The Court in *Van Breda* also held:

> [109] The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction 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. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus

> ensuring fairness to the parties and a more efficient process for resolving their dispute.

Application

[37] In light of the foregoing authorities, the Court must consider the factors set out in s. 11(2) to determine whether Alberta is clearly the more appropriate forum. In this regard:

a) Mr. Bit resides in Alberta. Clearly, this is a factor that weighs in favour of his position in relation to comparative convenience and expense. However, in my view, this is the only clear factor suggesting that Alberta is the more appropriate forum.

   There is directly conflicting evidence as to where the witnesses reside, but given that there are offices in Vancouver and Abbotsford, and that 77 people work out of those offices while 23 are in Edmonton, it must follow that at least some (and perhaps the majority) of the witnesses to Mr. Bit's activities resided in British Columbia.

b) Mr. Bit observes that the Forum Selection Clause provides for the application of Alberta law, but Alberta is not a jurisdiction that has significantly different laws from British Columbia regarding contract or breach of duty. The courts of this province would have no difficulty applying Alberta law to the circumstances of this case.

c) Mr. Bit submits that if he were to bring a wrongful dismissal case, he would do so in Alberta, as his employment was governed by the Alberta *Employment Standards Code*, R.S.A. 2000, c. E-9. However, he has not yet brought an action, and, again, British Columbia courts could hear, and determine, his wrongful dismissal suit (if brought). The possibility of a multiplicity of legal proceedings and conflicting decisions does not weigh heavily in the analysis.

d) Mr. Bit asserts that he has assets in Alberta but not in British Columbia, but enforcing a B.C. judgment in Alberta would not be particularly difficult. In any event, any such difficulty would disadvantage Krahn, not Mr. Bit, if the action were to proceed in B.C. Therefore, in the *forum non conveniens analysis*, this factor does not weigh in favour of Mr. Bit's argument that Alberta is clearly the more appropriate forum from his perspective.

[38] Finally, I have considered whether the Forum Selection Clause ought to be given weight in the *forum non conveniens* analysis. In *Hydro Aluminium* at para. 24, the Court of Appeal held:

> … Where a party to the contract has exercised its right under a non-exclusive jurisdiction clause to commence an action in the forum, the court will take the jurisdiction agreement into account when weighing the arguments for and against a stay in favour of another forum…

[39] As noted, Mr. Bit has not yet actually exercised his right to commence an action in Alberta. In my view, while the Forum Selection Clause should be given some weight in this case, it cannot be determinative. As indicated above, the Forum Selection Clause states that the parties *may* bring claims in Alberta, but it also expressly provides that they "need not" do so.

[40] Overall, in assessing all of the factors and evidence described above, I find that the *CJPTA* s. 11 factors are fairly evenly balanced, particularly because Mr. Bit will have to deal with a lawsuit in another province, but I am unable to find that Alberta is *clearly* the more appropriate forum.

Conclusion and Costs

[41] Mr. Bit's application for an order striking, dismissing or staying this action is dismissed. Costs of this application shall be governed by R. 14-1(12)(b) of the *Supreme Court Civil Rules.*

"The Honourable Justice Loo"