COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Yegre EB Ltd. v. Seguin,*
2024 BCCA 365

Date: 20241104
Docket: CA49352

Between:

Yegre EB Ltd.

Appellant
(Plaintiff)

And

Ronald Jack Seguin, 0713501 B.C. Ltd., 552417 B.C. Ltd., Seguin Holdings (No. 3) ULC., EB-RE (434) Investments ULC., 3057223 Holdings ULC., English Bay Chocolate Factory ULC., English Bay Blending and 628912 B.C. Ltd.

Respondents
(Defendants)

Before: The Honourable Madam Justice Horsman
The Honourable Justice Skolrood
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated August 25, 2023 (*Yegre EB Ltd. v. Seguin*, 2023 BCSC 1481, Vancouver Docket S225968).

Counsel for the Appellant:	S.D. Coblin M. Hashmi
Counsel for the Respondents:	M.B. Morgan J. Mayfield
Place and Date of Hearing:	Vancouver, British Columbia September 9, 2024
Place and Date of Judgment:	Vancouver, British Columbia November 4, 2024

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Justice Skolrood
The Honourable Justice Winteringham

Summary:

The appellant started a civil action in the Supreme Court of British Columbia claiming damages in tort and contract arising from its purchase of five properties from the respondents. The purchase agreement contained a forum selection clause which provided that the parties would submit to the jurisdiction of the Alberta courts for all purposes connected to the agreement. The chambers judge granted the respondents' application for a stay of proceedings on the basis that the forum selection clause gave Alberta exclusive jurisdiction.

Held: Appeal allowed. The judge erred in law in interpreting the case law as recognizing a distinction between the words "attorn" and "submit" in forum selection clauses. The clause in issue, properly interpreted, does not clearly and unambiguously confer exclusive jurisdiction. Since the respondents could not show that Alberta is a clearly more appropriate forum than British Columbia, the respondents' forum non conveniens argument also fails. The stay application is dismissed.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Overview

[1] This appeal concerns the interpretation and enforcement of a forum selection clause in a property purchase agreement that the parties entered into in 2015 (the "Purchase Agreement").

[2] Under the Purchase Agreement, the appellant purchased five industrial properties from the respondents. Two of the properties are located in British Columbia, and three are in Ontario. In 2022, the appellant commenced this proceeding in the Supreme Court of British Columbia ("BCSC") alleging, among other things, that the appellant was induced to enter the agreement by the respondents' fraudulent misrepresentations.

[3] The Purchase Agreement contained a forum selection clause, which provided that the parties submitted to the jurisdiction of the Alberta courts "for all purposes arising in connection with this Agreement" (the "Clause"). The parties disagree over the proper interpretation of the Clause. The respondents say the Clause reflected the parties' intention to give the Alberta courts exclusive jurisdiction. The appellant maintains that the Clause merely reflected the parties' agreement to submit to the

non-exclusive jurisdiction of the Alberta courts, but does not preclude a claim from being filed in British Columbia; that is, that the jurisdiction of the Alberta courts is non-exclusive.

[4] Relying on the Clause, the respondents applied for a stay of the British Columbia proceeding on the basis that the Alberta courts had exclusive jurisdiction. Alternatively, they argued that Alberta was the more appropriate forum. The judge below determined that the Clause was valid and enforceable, and assigned exclusive jurisdiction to the Alberta courts. Accordingly, she granted the stay. The appellant now appeals this decision.

[5] On appeal, the appellant argues that the judge erred in law in her interpretation of the Clause. Alternatively, the appellant says that the judge erred in failing to find the Clause unenforceable in light of the appellant's allegations of fraud. Finally, the appellant argues that even if the Clause is valid, clear, and enforceable, the judge erred in applying the Clause to the pleaded claims of fraud, conspiracy, and negligence.

[6] For the reasons that follow, I would allow the appeal, and dismiss the stay application.

Background

[7] The appellant is an Alberta corporation extraprovincially registered to carry on business in British Columbia. The corporate respondents are all British Columbia corporations that are, or were, controlled by the personal respondent Ronald Seguin. Mr. Seguin is the founder and creator of the English Bay Cookie Dough Batter brand. All of the respondents, with the exception of English Bay Chocolate Factory ULC, English Bay Blending, and 628912 B.C. Ltd., are parties to the Purchase Agreement.

The Notice of Civil Claim

[8] On July 22, 2022, the appellant filed a notice of civil claim in the BCSC seeking damages from the respondents in contract and tort in relation to the

respondents' alleged misrepresentations about the state of the properties that were sold under the Purchase Agreement.

[9] The notice of civil claim alleges that in 2015, the respondents began marketing their portfolio of five production facilities for sale. One of the facilities was a chocolate factory located in Delta, BC (the "Delta Property"). It is alleged that through their marketing activities, the respondents made representations that the subject properties had fully operational and functioning freezer and cooler space, which would attract a premium in rent. These representations are also said to have been expressly stated in the Purchase Agreement. The appellant pleads that in reliance on these representations, it entered into the Purchase Agreement for a purchase price of $33.5 million.

[10] Under the Purchase Agreement, the parties agreed that the appellant would enter into a new lease with the tenants of the Delta Property, who were the respondents English Bay Chocolate Factory and English Bay Blending (the "English Bay tenants"). The notice of civil claim alleges that in late 2020 and early 2021, the appellant and the English Bay tenants entered into negotiations, as anticipated by the tenancy agreement, over the basic rent to be paid at the Delta Property for the next five years. It is alleged that during negotiations, the English Bay tenants took the position that there ought to be no rent premium because there was no operational freezer or cooler. The rent dispute went to arbitration. The appellant alleges that in the course of the arbitration, the respondents admitted that the representations it made about the freezer and cooler space were untrue.

[11] The appellant seeks damages through various causes of action: breach of contract, fraudulent and negligent misrepresentation, and conspiracy.

[12] While the respondents have not yet filed a response to civil claim, it is evident from the appeal record and their submissions on appeal that the respondents deny the appellant's version of events. I have summarized the allegations in the notice of civil claim to provide context to the jurisdictional dispute. To state the obvious, the allegations have not yet been proven.

The stay application

[13] On November 16, 2022, the respondents filed a jurisdictional response to the notice of civil claim, disputing the BCSC's jurisdiction over the proceeding.

[14] On December 16, 2022, the respondents filed an application seeking an order permanently staying the appellant's claims on the basis that: (1) the parties agreed to a valid, clear, and enforceable exclusive forum selection clause that required the action to proceed in Alberta; or (2) alternatively, the BCSC should decline jurisdiction pursuant to s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*] on the basis that Alberta is the more convenient forum. I note that there is no dispute that British Columbia has territorial competence in the proceeding.

[15] The stay application focussed on the language of the Clause in the Purchase Agreement, which read as follows:

> 7.4 **Applicable Law**
>
> This Agreement shall be construed and enforced in accordance with the laws of the Province of Alberta and the laws of Canada applicable thereto and shall be treated in all respects as an Alberta contract. The parties hereto hereby submit to the jurisdiction of the Alberta courts for all purposes arising in connection with this Agreement.
>
> [Emphasis added.]

[16] The respondents argued that the Clause reflected the parties' agreement to give Alberta exclusive jurisdiction over any proceeding arising in connection with the Purchase Agreement. The appellant contended that the Clause simply reflected the parties' agreement to attorn to the jurisdiction of the Alberta courts, but not to grant exclusive jurisdiction to Alberta.

The chambers judgment: 2023 BCSC 1481

[17] In addressing the jurisdictional challenge, the chambers judge first observed that the enforceability of a forum selection clause is determined in accordance with the two-step approach set out in the governing authorities, including *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 [*Pompey*] and *Douez v. Facebook, Inc.*,

2017 SCC 33. At the first step, the applicant for the stay must establish that the clause is "valid, clear, and enforceable and that it applies to the cause of action before the court": Chambers Judgment at para. 15, citing *Douez* at para. 28. If the applicant discharges this onus, then at the second step the plaintiff has the onus of showing strong reasons why the court should not enforce the forum selection clause: Chambers Judgment at paras. 15–16.

[18] At the first step, the chambers judge concluded, on the basis of the evidence and the authorities presented by the parties, that the Clause should be interpreted as an exclusive jurisdiction clause, and not merely an attornment clause. The judge cited two main reasons for this conclusion.

[19] First, she distinguished the decision of this Court in *Old North State Brewing Co. v. Newlands Services Inc.*, 58 B.C.L.R. (3d) 144, 1998 CanLII 6512 (B.C.C.A.) [*Old North*], which considered a forum selection clause that the appellant argued was analogous to the one in the present case. In *Old North*, this Court found the clause in issue to be a mere attornment clause. The chambers judge explained the distinguishing features of *Old North* as follows:

> [24] In discussing *Old North*, the Court of Appeal in *BC Rail Partnership v. Trenton Works Ltd.*, 2003 BCCA 597 [*BC Rail*] referred to this language as a "limiting reference to attornment": at para. 19. In this case, as was the case in *BC Rail*, the Clause does not use the phrase "attorn" and instead states that the parties "submit" to the selected jurisdiction. Thus, *Old North* can be distinguished on this basis.
>
> [Emphasis added.]

[20] Second, the judge found parallels between the language in the Clause and the language of the forum selection clauses in issue in *BC Rail Partnership v. TrentonWorks Ltd.*, 2003 BCCA 597 [*BC Rail*] and *Angeline Chandra Inc. v. MNP LLP*, 2021 BCSC 363 [*Angeline*], which were interpreted to assign exclusive jurisdiction to another forum. By way of analogy to *BC Rail* and *Angeline*, the judge reasoned that the phrase "for all purposes arising in connection with the Agreement" in the Clause was not superfluous, and that this language supported a finding that the Clause was intended to confer exclusive jurisdiction. She stated:

> [27] The clauses in *Angeline* and *BC Rail* stand in contrast to the other examples provided by the plaintiff in which the Court found a clause to be a mere attornment clause. In all those cases, the impugned clauses lacked specific language indicating that they were to apply in all circumstances.
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> . . .
>
> [29] Therefore, consistent with the decisions in *BC Rail* and *Angeline*, the broad language used to define the scope of the Clause in this case, and the notable absence of any "limiting reference to attornment", strongly suggests that the parties intended the Clause to confer exclusive jurisdiction.
>
> [Emphasis added.]

[21] The judge next turned to the appellant's argument that the Clause was unenforceable because the respondent's fraudulent misrepresentations induced the appellant to enter the Purchase Agreement. The judge concluded that there was no evidence to show that the appellant was induced to agree to the Clause, as distinguished from the Purchase Agreement as a whole, by fraud or some other improper inducement. The appellant's allegation that the misrepresentation had led it to overpay for the Delta Property was, in the judge's view, "not the type of factor that renders the forum selection clause unenforceable": Chambers Judgment at para. 39.

[22] Having found that the Clause was valid and enforceable, and applied to the pleaded causes of action, the judge moved to the second step of the *Douez* analysis. She considered such factors as convenience to the parties and witnesses, any risk of unfairness to the appellant if the case was moved to Alberta, and the overarching interests of justice. The judge concluded that the appellant had not met its onus of establishing strong cause why the Clause should not be enforced. This aspect of the judge's reasons is not in issue on appeal.

[23] In light of these findings, it was unnecessary for the judge to consider the respondents' alternative argument that she should decline jurisdiction under s. 11 of the *CJPTA* on the ground that Alberta is a more appropriate forum.

Issues on appeal

[24] The appellant's primary ground of appeal is that the judge erred in law by interpreting the Clause as assigning exclusive jurisdiction to the Alberta courts.

[25] Alternatively, the appellant contends that the judge erred in finding the Clause to be valid and enforceable despite the allegation of fraud, and in applying the Clause to the tort claims (fraud, negligence, and conspiracy) as well as the contract claims.

[26] In the event it succeeds on any of its grounds of appeal, the appellant says this Court should determine the merits of the respondents' alternative argument—that Alberta is the more appropriate forum—rather than remitting the matter back to the lower court.

The legal framework

Forum selection clauses

[27] The legal principles that govern the interpretation and enforcement of forum selection clauses are set out in the decisions of the Supreme Court of Canada in *Pompey* and *Douez*. Courts will generally hold parties to the terms of the bargain reflected in such a clause, particularly where it is contained in a commercial contract that is the product of negotiation between sophisticated parties. However, because forum selection clauses may encroach on an area of public adjudication, they are not enforced in the same manner as other contractual clauses: *Douez* at paras. 26–27. Instead, the courts follow the two-step approach that is set out in *Pompey*, and restated at paras. 28–29 of *Douez*, as follows:

a) At the first step, the onus is on the applicant seeking the stay to establish, applying ordinary principles of contract law, that the forum selection clause is valid, clear and enforceable, and that it applies to the cause of action before the court.

b) At the second step, once the clause is found to be valid, clear and enforceable, the onus shifts to the plaintiff to show strong reasons why the court should not enforce the clause. In exercising its discretion at this step the court must consider all circumstances, including the convenience of the parties, fairness between the parties, and the interests of justice, as well as any relevant public policy considerations.

[28] Clear and express language is required to confer exclusive jurisdiction. If the forum selection clause is ambiguous, in the sense that it is open to more than one reasonable interpretation, it will not be construed to assign exclusive jurisdiction: *Old North* at para. 35. While there is no requirement that a forum selection clause contain the word “exclusive” in order to confer exclusive jurisdiction, there must be language that unambiguously signals the parties’ intention to select the chosen forum to the exclusion of any other form.

[29] If the court concludes that the forum selection clause is valid, clear, and enforceable, and that there are not strong reasons not to enforce the clause, then a stay of the proceeding will be granted.

Forum non conveniens

[30] Even where a court has territorial jurisdiction, and there is no contractual agreement to grant exclusive jurisdiction to another forum, the court may nevertheless decline jurisdiction where the applicant for a stay of proceedings demonstrates that the claims are more appropriately litigated in another forum. The framework governing the common law doctrine *forum non conveniens* analysis is set out in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 [*Van Breda*]:

> [103] If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

[31] In British Columbia, the common law of *forum non conveniens* is codified in s. 11 of the *CJPTA*, which provides:

> **11** (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

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

[32] The factors enumerated in s. 11(2) are non-exhaustive: *Van Breda* at para. 105. The *forum non conveniens* analysis does not require that all factors favour the defendant's proposed alternative forum, but it does place a burden on the defendant to show that the alternate forum is clearly more appropriate: *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39 at para. 55, citing *Breeden v. Black,* 2012 SCC 19 at para. 37. The usual state of affairs is that jurisdiction should be exercised by a court once it has been properly assumed. The plaintiff is entitled to their choice of forum unless it is shown that the alternate forum proposed by the defendant is clearly more appropriate: *Garcia* at para. 54, citing *Van Breda* at para. 109.

Analysis

The first ground of appeal: did the judge err in interpreting the Clause?

Standard of review

[33] The first ground of appeal relates to the judge's contractual interpretation, which raises issues of mixed fact and law. Appellate intervention is justified if the appellant demonstrates that the judge made an extricable error of law or a palpable and overriding error of fact. The Supreme Court of Canada has cautioned appellate courts to adopt a restrained approach to identifying extricable errors of law in disputes over contractual interpretation: *Trenchard v. Westsea Construction Ltd*., 2020 BCCA 152 at paras. 39–40, citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 53–54 [*Sattva*].

Did the judge err in failing to consider surrounding circumstances?

[34] The appellant first argues that the judge erred in law in failing to interpret the Clause by reference to objective surrounding circumstances, and instead looking only to what other cases have said about similar language in the past. I am not persuaded that the judge's reasons demonstrate such an error. The judge acknowledged that at the first step of the *Douez* analysis, the court is required to apply principles of contract law. The judge reviewed the surrounding factual circumstances. She indicated that in interpreting the Clause, she considered the evidence as well as the case authorities presented by the parties. It is not surprising that the judge placed reliance on the case law given the manner in which the application was argued before her. Furthermore, it was not an error for her to look to judicial precedents that have interpreted similar contractual language, as they "may be of some persuasive value": *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 38.

[35] The appellant has not, in any event, pointed to any surrounding circumstances that clearly support the conclusion that the parties intended the forum selection clause to be non-exclusive. The fact that the properties sold under the Purchase Agreement are located in British Columbia and Ontario, and the corporate defendants are British Columbia corporations, might support the appellant's argument that the parties wished to ensure that no one could object to proceedings being initiated in Alberta. However, these facts might also support the respondents' argument that the parties wished to avoid uncertainty as to which jurisdiction was the most convenient by requiring disputes to be resolved in Alberta. The appellant emphasizes that its lease agreement with the English Bay tenants provided that it would be governed by the law of British Columbia. However, the parties also agreed that the Purchase Agreement would be governed by the law of Alberta. In other words, the surrounding circumstances that were allegedly overlooked by the chambers judge did not strongly favour one interpretation of the Clause over the other.

Did the judge err in her interpretation of Old North?

[36] The appellant next argues that the judge made an extricable error of law by misinterpreting the judicial precedents in a manner that had a material impact on her interpretation of the Clause. For the reasons that follow, I conclude that the judge erred in the manner alleged by the appellant.

[37] The judge distinguished *Old North* because the clause in issue in that case contained language that was described in *BC Rail* as a "limiting reference to attornment": Chambers Judgment at para. 24. The judge found it significant that the Clause in the present case used the phrase "submit" rather than "attorn". She distinguished *Old North* on the basis of this difference in terminology. In the key paragraph of her analysis, the chambers judge concluded that "the notable absence of any 'limiting reference to attornment', strongly suggests that the parties intended the Clause to confer exclusive jurisdiction": Chambers Judgment at para. 29.

[38] However, the distinction drawn by the judge between the words "attorn" and "submit" is not supported by a proper reading of *Old North* and *BC Rail*, nor by the generally-accepted meaning of those terms in this context.

[39] The forum selection clause at issue in *Old North* read as follows (at para. 7):

> 17. GOVERNING LAW
>
> This Agreement will be governed by and interpreted in accordance with the laws of the Province of British Columbia, Canada and the parties will attorn to the jurisdiction of the Courts of the Province of British Columbia, Canada.

[40] The question of how this clause should be interpreted arose in the context of an appeal from an order enforcing a North Carolina judgment for damages in favour of the plaintiff. The defendant argued, among other things, that the North Carolina court had no jurisdiction over the dispute because the forum selection clause gave exclusive jurisdiction to the British Columbia courts. In addressing the defendant's argument, this Court set out the principles that govern the interpretation of forum selection clauses:

> 35 The burden of proving that such a clause confers exclusive jurisdiction rests on the party who so asserts: see *Evans Marshall & Co. v. Bertola*

> *S.A.*, [1973] 1 W.L.R. 349 (Eng. C.A.) at 361. It has been held that clear and express language is required to confer exclusive jurisdiction: see *Westcott v. Alsco Products of Canada Ltd.* (1960), 26 D.L.R. (2d) 281, 45 M.P.R. 394 (Nfld. C.A.), and *Khalij Commercial Bank Ltd. v. Woods* (1985), 17 D.L.R. (4th) 358 (Ont. H.C.). An ambiguous choice of jurisdiction clause will not be construed to grant exclusive jurisdiction: see *Schleith v. Holoday* (1997), 31 B.C.L.R. (3d) 81 (B.C. C.A.).

[41] The Court in *Old North* held that the clause in issue could reasonably be construed as conferring concurrent jurisdiction. However, mere attornment to the jurisdiction of the British Columbia courts did not indicate the parties intended the jurisdiction to be exclusive:

> 36 …to say that the parties will attorn to the jurisdiction of the B.C. courts is very far from saying that the courts of no other state can exercise jurisdiction, if there is a proper foundation for doing so according to the rules of private international law.

[42] It is not apparent from the judgment in *Old North* that the Court attached any particular significance to the term “attorn” as opposed to “submit”. As the appellant notes, the cases cited by the Court in *Old North* for the proposition that clear and express language is required to confer exclusive jurisdiction include cases where jurisdiction clauses found to be non-exclusive used the language of “submit”: for example, *Khalij Commercial Bank Ltd. v. Woods*, 17 D.L.R. (4th) 358, 1985 CanLII 1947 (Ont. H.C.) at 360 (“each of the parties hereto hereby submits to the jurisdiction of the Civil Court of Dubai”, emphasis added). The result is the same: an agreement to “submit” or “attorn” to a court’s jurisdiction, without more, has been interpreted to signal non-exclusivity.

[43] I note, further, that the terms “submit” and “attorn” are used interchangeably in case law addressing the issue of how to interpret jurisdictional clauses: for example, *Sleep Number Corporation v. Maher Sign*, 2020 ONCA 95 at para. 7 [*Sleep Number*]; *Bank of Credit and Commerce International (Overseas) Ltd. v. Gokal*, 99 B.C.L.R. (2d) 176, 1994 CanLII 2042 (B.C.C.A.) at paras. 12–13; *Saskatchewan (Attorney General) v. Pasqua First Nation*, 2016 FCA 133 at para. 108.

[44] In *STMicroelectronics Inc. c. Matrox Graphics Inc.*, 2007 QCCA 1784 [*Matrox*], the Quebec Court of Appeal considered the exclusivity of a forum selection clause which used the word “submit”. The Court directly addressed the question of whether there was any significance in the use of the word “submit” as opposed to “attorn”. Consistent with the case law that treats the words “attorn” and “submit” as synonymous in this context, Bich J.A., writing for the Court in *Matrox*, stated:

> [108] … Cette clause, sauf pour l'usage du verbe «submit» présente des ressemblances avec les clauses d'«attornment» dont il est question plus haut. L'usage même du verbe «submit» plutôt que «attorn» ne me semble pas une différence significative.
>
> [108] … Apart from the use of the verb “submit”, this clause bears some resemblance to the attornment clauses discussed earlier. Even the use of the verb “submit”, rather than “attorn” does not strike me as a significant difference.
>
> [Unofficial English translation provided by Société québécoise d’information juridique (SOQUIJ).]

[45] In the present case, the chambers judge interpreted this Court’s decision in *BC Rail* to place particular significance on the use of the word “submit” as opposed to “attorn” in determining whether a forum selection clause is exclusive. However, I do not read *BC Rail* to make any such distinction. The forum selection clause at issue in that case was contained in a lease, and read as follows (at para. 5):

> 19(g) This Agreement shall be governed in all respects, whether as to validity, construction, capacity, performance or otherwise, by and under the laws of Nova Scotia, Canada (without giving effect to principles of conflicts of laws). Lessee irrevocably and unconditionally submits to the jurisdiction of, and venue in, federal and provincial courts located in Nova Scotia, Canada for any proceeding arising under this Agreement…
>
> [Emphasis added.]

[46] The “lessee” under the agreement was BC Rail Partnership, who agreed to lease rail box cars from the defendant Greenbrier Leasing Limited. Several of the leased box cars were involved in a derailment. BC Rail brought an action for damages against Greenbrier for breach of the lease, and against other defendants for negligence. The defendants applied for a stay on the basis that clause 19(g) of the lease granted exclusive jurisdiction to the Nova Scotia courts. The court below held that the clause could “be read more literally” as reflecting BC Rail’s agreement

(as the "Lessee" referred to in the clause) not to dispute the jurisdiction of the Nova Scotia courts if proceedings under the lease were commenced there: *BC Rail* at para. 8. Accordingly, the stay application was dismissed.

[47] On appeal in *BC Rail*, this Court reversed the decision of the lower court, and stayed the proceeding. The Court found that the forum selection clause was an exclusive jurisdiction clause, reasoning as follows:

> [18] Turning to the clause itself, I am of the opinion that objectively interpreted it was intended by the parties to be an exclusive jurisdiction clause and not simply an attornment clause.
>
> [19] Clause 19(g) refers to Nova Scotia "venue" as well as jurisdiction and to "*any proceeding* arising under this agreement" [emphasis added]. Given their ordinary meaning, I think that "any proceeding" must be intended to mean proceedings commenced by either party to the lease and not merely those commenced by Greenbrier. There is no limiting reference to attornment as in the *Old North State* clause. If clause 19(g) was not interpreted to extend to proceedings by either party, the clause would in effect be silent on proceedings commenced by BC Rail in British Columbia or any other jurisdiction having jurisdiction *simpliciter*. I do not think that it is commercially reasonable to conclude that the parties did not intend to bring proceedings by BC Rail as well as by Greenbrier within the express words of the agreement.
>
> . . .
>
> [21] In light of the lease taken as a whole, it seems unlikely that the parties would have intended the jurisdiction clause to be limited only to proceedings commenced by Greenbrier.
>
> [Italic emphasis in the original; underline emphasis added.]

[48] As is evident in this analysis, the two alternative interpretations of the clause proposed by the parties were: (1) BC Rail would not dispute jurisdiction if Greenbrier commenced a proceeding in Nova Scotia, or (2) the Nova Scotia courts had exclusive jurisdiction over any proceeding commenced by either party. Accordingly, the focus of the interpretive analysis undertaken in *BC Rail* was whether the clause could be reasonably interpreted to apply only to proceedings commenced by Greenbrier in Nova Scotia.

[49] The Court in *BC Rail* found that the clause in issue in *Old North* was distinguishable because it "[did] not address jurisdiction apart from attornment": at

para. 15. It is in this context that the reference in para. 19 of *BC Rail* to the absence of a "limiting reference to attornment" must be understood. This reference relates to the Court's conclusion in *BC Rail* that the clause in Old North was "simply an attornment clause". There is nothing in *BC Rail* to suggest that the Court found the use of the term "submit" as opposed to "attorn" to be significant. As I have already reviewed, those terms have been treated as synonymous in the relevant case law, including in decisions of this Court.

[50] Accordingly, I conclude that the judge erred in interpreting the case law as recognizing a relevant distinction between the terms "attorn" and "submit", so as to lend weight to the respondents' submission that the Clause granted exclusive jurisdiction to the Alberta courts. This is an extricable error of law because it concerns the judge's misinterpretation of a legal precedent as establishing a principle ("submit" and "attorn" have different meanings) that is unconnected to the factual matrix. The application of an incorrect principle is an error of law: *Sattva* at para. 53.

[51] The significance that the judge placed on the parties' choice of the word "submit" is one of the two main reasons she gave for her conclusion about the scope of the Clause, and thus the error was material to her interpretation. As the judge's analysis reflects material legal error, I consider it open to this Court to carry out its own interpretation of the Clause.

Is the Clause an exclusive jurisdiction Clause?

[52] For ease of reference, I repeat the critical portion of the Clause:

> The parties hereto hereby submit to the jurisdiction of the Alberta courts for all purposes arising in connection with this Agreement.

[53] The question is whether this language clearly, expressly, and unambiguously reflects the parties' intention to assign exclusive jurisdiction to the Albert courts. If there is a reasonable alternative interpretation that the words, read in context, can bear, then the Clause will not be interpreted as an exclusive jurisdiction clause.

[54] I have explained my reasons for concluding that the judge erred in placing significance on the use of the word “submit” to signal the parties’ intention that the Clause grants exclusive jurisdiction to the Alberta courts. The parties’ agreement to “submit to the jurisdiction of Alberta courts”, on its own, does not evidence an intention that the jurisdiction is exclusive. The more difficult interpretive question is what the parties intended by the addition of the words “for all purposes arising in connection with this Agreement”.

[55] The appellant says that these words have no bearing on the question of exclusivity, but rather refer to the scope of matters that the parties agree may be submitted (on a non-exclusive basis) to the jurisdiction of the Alberta courts. The appellant argues that the parties could easily have provided for the exclusive jurisdiction of the Alberta courts by inserting words connoting exclusivity, such as “exclusively” or “only”. Instead, the language chosen suggests an intention to confer non-exclusive jurisdiction to the Alberta courts in respect of any matter (“for all purposes”) that might arise in connection with the Agreement.

[56] The respondents propose an alternative interpretation of the Clause. They say that the expression “for all purposes” has essentially the same meaning as “for all legal proceedings”, and the comprehensive nature of the language connotes exclusivity. Otherwise, the respondents say, the words “for all purposes” are superfluous.

[57] In my view, both interpretations are plausible on the wording of the Clause, creating an ambiguity as to what the parties intended. For the reasons I have stated, the surrounding circumstances do not resolve the ambiguity. In these circumstances, looking to the case law for guidance as to how such clauses have been interpreted in other contexts is helpful, although not determinative.

[58] There are a number of cases that have addressed the interpretation of forum selection clauses that share the following common features with the Clause: (1) they state that the parties will submit or attorn to a particular jurisdiction; (2) they do not use the words “exclusive” or “non-exclusive”, which would make the intention much

clearer; and (3) they state that the jurisdiction of the court applies to a wide variety of claims using similar language to "for all purposes".

[59] The appellant places heavy reliance on the decision of the Ontario Court of Appeal in *Sleep Number*. The clause there read: "[the respondent] hereby attorns to the jurisdiction of the Courts of Ontario for the purpose of pursuing any legal remedies": at para. 3 (emphasis added). The Ontario Court of Appeal found the clause was permissive rather than exclusive, reasoning as follows:

> [7] The clause bears striking similarity to clauses that other courts have refused to characterize as conferring exclusive jurisdiction. It provides that the respondent "attorns" (in other words, accepts, submits or yields) to Ontario jurisdiction and says nothing that excludes the jurisdiction of another possible forum. We do not agree that the words in the clause applying it to the pursuit of "any legal remedies" amount to a conferral of exclusive jurisdiction. The word "any" refers to "legal remedies" and has no bearing on choice of forum. In *Old North State Brewing Company Inc. v. Newlands Services Inc.* (1998), 58 B.C.L.R. (3d) 144, at para. 35, the B.C. Court of Appeal held that an agreement that "the parties will attorn to the jurisdiction of the Courts of the Province of British Columbia" did not meet the standard of "clear and express language … required to confer exclusive jurisdiction" and that it would have been a simple matter to add the word "exclusive" if that was what was intended…
>
> [Emphasis added.]

[60] In *Matrox*, the Quebec Court of Appeal addressed a forum selection clause that was phrased in similar terms (at para. 14):

> Buyer agrees that it will submit to the personal jurisdiction of the competent courts of the Statute of Texas and of the United States sitting in Dallas County, Texas, in any controversy or claim arising out of the sale contract…

[61] In considering the competing interpretations put forward by the parties, the Court in *Matrox* thoroughly reviewed the relevant case law, including *Old North* and *BC Rail*. The Court found that the wording of the clause could plausibly be interpreted as intending to assign either exclusive or non-exclusive jurisdiction to the Texas courts. Further, the nature of the contract, the circumstances in which it was formed, and the provisions of the contract as a whole, were all equally compatible with either interpretation: at paras. 117–122. In addressing how to resolve the parties' intention in these circumstances, the Court stated:

> [123] In short, there is not much context here and, to discover the parties' intent (particularly that of the stipulator STM), it is therefore necessary to rely essentially on the wording of the clause. But, as we saw earlier, the wording is not clear and lends itself *a priori* to both interpretations proposed by the parties.
>
> [124] As a result, it may be concluded that the wording of Clause 19 does not have the mandatory nature or the degree of clarity and precision required to confer, according to the Supreme Court in *GreCon Dimter*, exclusive jurisdiction on the foreign authority.
>
> [Unofficial English translation provided by SOQUIJ.]

[62] It should be noted that the dispute in *Matrox* was governed by the provisions of the *Civil Code of Québec*, particularly Article 3148 (the Quebec courts have no jurisdiction "where the parties have chosen by agreement to submit the present or future disputes between themselves…to a foreign authority…" unless the defendant submits to the jurisdiction of the Quebec courts). However, the Court in *Matrox* noted that the principles of interpretation applicable to forum selection clauses under civil law are similar to those under the common law—namely, that in both the goal is to determine the parties' intent by looking at the text of the clause and the surrounding context: at paras. 102–103. In addition, in Quebec civil law, as in common law, a clause must be clear and unambiguous to confer exclusive jurisdiction: *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46 at para. 27.

[63] There are other examples in the case law where similarly-worded clauses have been interpreted as non-exclusive. See, for example: *Matijczak v. Homewood Health Inc.*, 2021 BCSC 1658; *Multiactive Software Inc. v. Advanced Service Solutions Inc.*, 2003 BCSC 643; *E.K. Motors Limited v. Volkswagen Canada Ltd.*, [1973] 1 W.W.R. 466, 1972 CanLII 802 (Sask. C.A.). It appears that the trend of the law in the United States is also to interpret such clauses as non-exclusive: John F. Coyle, "Interpreting Forum Selection Clauses" (2019) 104 Iowa L. Rev. 1791 at 1799–1803.

[64] On the other hand, in the two cases cited by the trial judge—*BC Rail* and *Angeline*—the courts interpreted similarly-worded forum selection clause as

assigning exclusive jurisdiction. These cases do, however, have certain distinguishing features.

[65] As I have noted, the interpretive dispute in *BC Rail* was whether the clause only bound BC Rail to accept the jurisdiction of the Nova Scotia courts in an action commenced by the other contracting party, or whether it applied to all parties to the contract. The Court's interpretation of the language of "any proceeding arising under the agreement" in that case focussed on the question of who was caught by the clause. While the Court did conclude that the clause, when objectively interpreted in its commercial context, was intended to be an exclusive jurisdiction clause, it is not clear to what extent the words "any proceeding arising under the agreement" grounded this conclusion.

[66] The clause in issue in *Angeline* provided that: "the parties hereby agree to attorn to the jurisdiction of the courts of Alberta with respect to any disputes thereunder": at para. 2. The Court found that "the mutual and objective intentions of the parties…would have been that the Alberta courts would have exclusive jurisdiction": at para. 57. However, that conclusion appears to have been driven by the fact that the surrounding context of the partnership dispute weighed heavily in favour of interpreting the clause as intending exclusive jurisdiction: at paras. 54–62.

[67] On appeal, the respondents also rely on *Momentous.ca Corp v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722, aff'd 2012 SCC 9 [*Momentous*]. Specifically, the respondents rely on the Ontario Court of Appeal's decision to uphold the lower Court's finding that the following clause was an exclusive jurisdiction clause: "the parties submit to personal jurisdiction in the state of North Carolina, the courts thereof…for the purpose of any suit, action or other proceeding": at para. 18.

[68] However, the core dispute in *Momentous* was not over the interpretation of the forum selection clause. The issue was whether the owners of a baseball team could commence an action against the defendant league in Ontario in relation to the team's withdrawal from the league. The relationship between the parties was

governed by two agreements and the league's by-laws. The agreements contained the forum selection clause I have quoted above, as well as terms requiring the parties to waive any resort to the Canadian legal system, and instead to resolve disputes through the arbitration process provided by the by-laws. The owners did not appear to dispute that the effect of the agreements was to deprive the Ontario courts of jurisdiction. Instead, they argued that the clause should not be enforced and that the league had attorned to the jurisdiction of the Ontario courts. Neither the lower court nor the Court of Appeal engaged in a detailed interpretation of the forum selection and arbitration clauses, and neither considered the effect of the forum selection clause in isolation.

[69] As is evident from the foregoing review, the case law is not entirely cohesive in the effect to be given similarly-worded clauses. However, in those cases where such clauses have been interpreted as exclusive jurisdiction clauses, there has been support for such an interpretation in the other provisions of the agreement or the surrounding context. There is no such support in the present case. The respondents do not argue that any ambiguity in the wording of the Clause can be resolved by reference to other provisions in the Purchase Agreement. Nor do the objective surrounding circumstances assist.

[70] The burden is ultimately on the respondents to demonstrate that the Clause clearly, expressly, and unambiguously reflects the parties' intention that disputes will exclusively be adjudicated by the Alberta courts. In this case, the application of principles of contractual interpretation lead to two reasonable interpretations of the language of the Clause, including an interpretation of the Clause as intending non-exclusive jurisdiction. As such, I conclude that the respondents have not discharged their burden of demonstrating that the Clause had the clear, express, and unambiguous effect of granting jurisdiction to the Alberta courts to the exclusion of all other forums. Instead, it should be interpreted, as argued by the appellant, as granting non-exclusive jurisdiction to Alberta.

Alternative grounds of appeal

[71] I have concluded that the Alberta courts have non-exclusive jurisdiction under the Clause. Thus, the Clause is not an impediment to the commencement of this proceeding in British Columbia. In light of this conclusion, it is unnecessary for me to consider the appellant's alternative grounds of appeal: that the judge erred in finding the Clause enforceable despite the allegations of fraud; and in applying the Clause to the pleaded claims of fraud, conspiracy, and negligence. The only issue remaining is the respondents' alternative position that the British Columbia courts should decline jurisdiction on the basis of a *forum non conveniens* analysis.

Forum non conveniens

[72] The appellant argues that if this Court concludes that the Clause, properly interpreted, does not grant exclusive jurisdiction to the Alberta courts, we should then determine the respondents' alternative argument—not addressed by the chambers judge—that Alberta is the more convenient forum. The respondents contend that, in the event the judge's interpretation of the Clause is overturned, the Court should remit the matter back to the Supreme Court rather than deciding the *forum non conveniens* issue in the first instance.

[73] In my view, it is feasible and in the interests of justice for this Court to determine the question of whether Alberta is clearly the more appropriate forum, rather than remitting the matter back to the Supreme Court. The record is fully developed, the background facts are reviewed at length in the chambers judgment, and there do not appear to be any contested facts that would require resolution in order to decide the issue. The parties should be saved the expense and time of a further proceeding to address the respondents' remaining jurisdictional objection, rather than simply getting on with the litigation.

[74] Having regard to the factors in s. 11(2) of the *CJPTA*, I observe:

a) The Delta Property is in British Columbia, and many of the witnesses are located here. The corporate respondents are all British Columbia

companies. The respondent Mr. Seguin deposes that he resides in Alberta, and the appellant has its head office in Alberta. However, to the extent that a proceeding in British Columbia may require parties and witnesses to travel, there is no evidence that it would be comparatively more inconvenient or expensive than if the proceeding was litigated in Alberta.

b) The Purchase Agreement provides that it is governed by the law of Alberta. However, the respondents have not pointed to any difference in the law of Alberta and British Columbia that is relevant to the dispute, which will turn largely on common law principles of contract and tort that are the same in both jurisdictions.

c) There are no other proceedings extant that have arisen under the Purchase Agreement, and therefore no concern with avoiding a multiplicity of proceedings.

d) For the same reason, there is no concern with the need to avoiding conflicting decisions in different courts.

e) The appellant will face no difficulty in enforcing an eventual judgment if the action proceeds in British Columbia.

f) The courts of British Columbia will undoubtedly provide a fair trial to the parties.

[75] To the extent that the Clause is relevant to the *forum non conveniens* analysis, it is a neutral factor. The Clause does not state a preference for proceedings in Alberta, but rather confirms the parties' commitment not to object to the jurisdiction of the Alberta courts if a proceeding was commenced there.

[76] The respondents do not point to any other factor that is relevant to the *forum non conveniens* analysis in this case. Indeed, the respondents have advanced no

argument in support of their position that Alberta is the more appropriate forum, other than to maintain that the issue must be remitted to the Supreme Court.

[77] I conclude, accordingly, that the respondents have not discharged their burden of demonstrating that Alberta is clearly the more appropriate forum. There is no basis in the record to disrupt the appellant's presumptive entitlement to bring this proceeding in British Columbia.

Disposition

[78] I would allow the appeal and dismiss the respondents' stay application.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Justice Winteringham"