# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bakali v. Mak,*
2024 BCSC 2345

Date: 20241220
Docket: S248149
Registry: New Westminster

2024 BCSC 2345 (CanLII)

Between:

**Ahmed Jusab Bakali dba H.P. Enterprise**

Plaintiff

And

**Hung Tim Mak aka Hung Tim Ricky Mak aka Ricky Mak, Salina Mee Yu Kam aka Salina Kam, Ho Fai Mak, Ricky Enterprises Limited trading as Ricky Trading Company and Granding Limited**

Defendants

Before: The Honourable Justice Girn

## Reasons for Judgment

Counsel for the Plaintiff: D. Gautam

Counsel for the Defendants, Hung Tim Mak aka Hung Tim Ricky Mak aka Ricky Mak, Salina Mee Yu Kam aka Salina Kam, Ho Fai Mak and Granding Limited: O. Ahmed, K. Alibhai

No other appearances:

Place and Dates of Hearing: New Westminster, B.C.
February 6, 2024
April 17-18, 2024 and
June 12, 2024

Place and Date of Judgment: New Westminster, B.C.
December 20, 2024

# Table of Contents

**INTRODUCTION** .......... **3**
**BACKGROUND** .......... **4**
The Parties .......... 4
The Underlying Claim .......... 5
**LEGAL PRINCIPLES** .......... **5**
Territorial Jurisdiction .......... 6
Attornment .......... 6
Ordinary Residence .......... 8
Real and Substantial Connection .......... 8
Forum Non Conveniens .......... 9
**DISCUSSION** .......... **11**
Has Ricky Trading attorned to the jurisdiction? .......... 11
Does the Court have territorial jurisdiction over the Defendants? .......... 13
Ordinary Residence .......... 13
Real and Substantial Connection .......... 15
Should the Court decline jurisdiction on the basis of forum non conveniens? .......... 19
Comparative convenience and expense .......... 20
The law to be applied to the proceeding .......... 21
Avoiding multiple legal proceedings and conflicting decisions in different courts .......... 21
Enforcement of an eventual judgement .......... 22
Fair and efficient working of the Canadian legal system .......... 22
**CONCLUSION** .......... **23**

2024 BCSC 2345 (CanLII)

2024 BCSC 2345 (CanLII)

## INTRODUCTION

[1] This is an application under the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*].

[2] There are five defendants in the main action: Hung Tim Mak, who is known as Ricky Mak ("Ricky"), Salina Mee Yu Kam ("Salina"), Ho Fai Mak ("Ho"), and two corporations, Ricky Enterprises Limited trading as Ricky Trading Company ("Ricky Trading") and Granding Limited ("Granding"). Given that some of the applicants have the same surname, I will refer to the individuals by their given names. By doing so, I mean no disrespect.

[3] Four of the five defendants, Ricky, Salina, Ho and Granding (the "Applicants") seek an order dismissing this action on the basis that this Court does not have jurisdiction over them in respect of the claims made by the plaintiff, Ahmed Jusab Bakali dba H.P. Enterprise ("the plaintiff").

[4] Alternatively, the Applicants seek an order staying the claims against them or, alternatively, an order that, based on the doctrine of *forum non conveniens*, this Court is not the most appropriate forum for the resolution of the matters raised in this proceeding.

[5] Ricky Trading is not participating in this application and there is dispute on whether it has attorned to the jurisdiction. In April 2021, Ricky Trading was wound up and a liquidator was appointed in June 2021 in Hong Kong, details which will be outlined later in these reasons.

[6] In respect of the underlying claim, the plaintiff filed a notice of civil claim (the "NOCC") on February 6, 2023. The Applicants filed a jurisdictional response on March 28, 2023. Ricky Trading did not file a jurisdictional response. The Applicants filed this application on October 23, 2023.

[7] The underlying claim concerns non-payment of funds for the delivery of fish products sold in Hong Kong by the plaintiff to Ricky Trading. The plaintiff alleges that

Ricky and Ricky Trading made misrepresentations and never intended to pay the plaintiff in respect of this deal. The plaintiff further alleges that with the help of Ho and Salina, Ricky and Ricky Trading misappropriated the funds for the upkeep and maintenance of a property in Richmond owned by Ho.

2024 BCSC 2345 (CanLII)

## BACKGROUND

### The Parties

[8] The plaintiff runs a sole proprietorship, H. P. Enterprises, which is registered in Mumbai, India. The sole proprietorship does not conduct any business in British Columbia. The plaintiff is in the business of supplying dried fish products and had been supplying products to Ricky Trading for a number of years.

[9] Ricky Trading is a company incorporated in Hong Kong in 2010. It is in the business of importing and exporting seafood products to and from Hong Kong. Ricky is the sole director of Ricky Trading. As noted above, Ricky Trading was wound up in liquidation proceedings in April 2021, which are currently being handled by a liquidator in Hong Kong. Ricky Trading does not have an office or any business facility in Canada.

[10] Salina is Ricky's wife. Salina lives in Richmond with her children. Ho is she and Ricky's eldest son. It does not appear that Salina is in any way involved with Ricky Trading or Granding.

[11] Ho resides and owns a home in Richmond, which he purchased in 2014 (the "Richmond Property"). Land title documents show that he is the registered owner of the Richmond Property in fee simple.

[12] Ho is the sole director and shareholder of Granding, a holding company incorporated in Hong Kong. In October 2009, Ho became the sole director of Granding when he purchased its shares from Ricky. Ho deposes that Ricky does not have any legal or beneficial interest in Granding, nor has Granding ever had any dealings with Ricky Trading. The corporate documents support this. Ho also deposes that despite his intentions in 2009, he never started a business. Ho

deposes that Granding has never done any business, holds no assets, and has never had any dealings with Ricky Trading. There is no evidence to the contrary.

### The Underlying Claim

[13] As noted above, the underlying claim concerns nonpayment of funds for delivery of fish products that were sold in Hong Kong by the plaintiff to Ricky Trading.

[14] The plaintiff agreed to sell fish products to Ricky Trading around May 2020. The products were sent from India to Hong Kong. After Ricky Trading and the plaintiff entered into the agreement, Ricky Trading arranged to sell the fish products to two Chinese companies, Liang Yongda Operating Maoming City Yongda Dried Goods Wholesale House and Chen Xiong Operating Xinglong Seafood House (the "Chinese buyers"). Once the product arrived in Hong Kong and after inspection, Ricky Trading forwarded the shipment to the Chinese buyers in Mainland China.

[15] Ricky deposes that the Chinese buyers did not pay for the fish products, although the evidence does appear to support that some payments, if not all, were made. In September 2020, Ricky Trading commenced litigation in Hong Kong against the Chinese buyers for non-payment of funds. As Ricky Trading is in liquidation, the claims against the Chinese buyers have been assumed by the liquidator.

[16] In November 2020, a third-party company based in India, Reliable Trading Co. ("Reliable") filed a petition against Ricky Trading seeking that it be wound up. Reliable operates within a cooperative of like-companies which includes the plaintiff. The plaintiff is not a party to the winding up proceedings that forced Ricky Trading to go into liquidation.

## LEGAL PRINCIPLES

[17] The *CJPTA* governs the territorial competence of this Court and the discretion as to its exercise. The *CJPTA* is modeled on the 1994 *Uniform Court Jurisdiction and Proceedings Transfer Act*, published by the Uniform Law Conference of

2024 BCSC 2345 (CanLII)

Canada: *Dembroski v. Rhainds*, 2011 BCCA 185 at para. 23. The aim of the legislation is to "foster an orderly and uniform approach" to issues of territorial jurisdiction by codifying the existing common law on the subject: *Dembroski* at para. 23.

2024 BCSC 2345 (CanLII)

[18] In this case, both jurisdiction and forum are at issue with respect to the various defendants. The Court must determine: (1) whether it has territorial competence over the defendants; and (2) whether to decline to exercise its jurisdiction over certain defendants on the ground of *forum non conveniens*.

### Territorial Jurisdiction

[19] Under s. 3 of the *CJPTA*, this Court has territorial competence over a defendant only if one or more of the following apply:

> (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 <u>person submits to the court's jurisdiction</u>,
>
> (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 <u>ordinarily resident in British Columbia</u> at the time of the commencement of the proceeding, or
>
> (e) there is <u>a real and substantial connection</u> between British Columbia and the facts on which the proceeding against that person is based.
>
> [Emphasis added.]

### Attornment

[20] Section 3(b) refers to the concept of attornment, which is a "stand-alone basis for the assumption of jurisdiction" which "arises when a defendant is deemed to have submitted to the jurisdiction of a court that otherwise would not have jurisdiction over them by actions inconsistent with a denial of that jurisdiction": *Nordmark v. Frykman*, 2019 BCCA 433 at para. 47 (emphasis removed). In other words, "a defendant can, by their actions, vest a court with jurisdiction the court otherwise would not have": *Nordmark* at para. 47. The rationale of attornment or submission "is that a party who actively involves him or herself in litigation thereby accepts the court's jurisdiction":

*International Raw Materials Ltd. v Steadfast Insurance Company*, 2023 BCSC 1389 at para. 48.

[21] Rule 21-8 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, sets out the method for which a party can dispute the jurisdiction of this Court without attorning. A party is to file a jurisdictional response in Form 108. Under Rule 21-8(5), if the party, within 30 days of filing that jurisdictional response, then serves an application to strike out a pleading or to dismiss or stay a proceeding, then the following applies:

> (a) the party does not submit to the jurisdiction of the court in relation to the proceeding merely by filing or serving any or all of the following:
>
> > (i) the jurisdictional response;
> >
> > (ii) a pleading or a response to petition under subrule (1) (c);
> >
> > (iii) a notice of application and supporting affidavits under subrule (1) (a) or (b), and
>
> (b) until the court has decided the application or the issue raised by the pleading, petition or response to petition, the party may, without submitting to the jurisdiction of the court,
>
> > (i) apply for, enforce or obey an order of the court, and
> >
> > (ii) defend the proceeding on its merits.

[22] On its face, Rule 21-8 seems to establish a 30-day period in which a party must act in filing its jurisdictional response and other pleadings without attorning. However, in *Stewart v. Stewart*, 2017 BCSC 1532 at para. 26, Justice Abrioux (then of this Court) held that failing to bring an application within that 30-day period does not constitute attornment on its own. Justice Abrioux ultimately found that the defendant had attorned in that case for other reasons.

[23] In *Xi v. Zhang*, 2018 BCSC 2559 at paras. 43–47, Justice H. Holmes (as she then was) considered whether a defendant in a family law proceeding had attorned by failing to meet the 30-day timeline. The defendant filed a jurisdictional response, but then failed to bring an application within 30 days. The plaintiff argued that he had thereby attorned to the jurisdiction. In considering the parallel Rule 18-2(5) of the *Supreme Court Family Rules*, B.C. Reg. 169/2009, and Abrioux J.'s decision in *Stewart*, Holmes J. found that the defendant had not attorned to the Court's

2024 BCSC 2345 (CanLII)

jurisdiction by failing to meet the 30-day timeline. Unlike *Stewart*, the plaintiff had not argued any alternative basis for attornment. See also *Cleeves v. The Warden and Fellows of St. Antony's College in the University of Oxford*, 2021 BCSC 686 at paras. 66–74.

2024 BCSC 2345 (CanLII)

**Ordinary Residence**

[24] Where a person involved is a corporation, s. 7 of the *CJPTA* clarifies what it means for a corporation to be "ordinarily resident in British Columbia":

> (a) the corporation has or is required by law to have a registered office in British Columbia,
>
> (b) pursuant to law, it
>
> > (i) has registered an address in British Columbia at which process may be served generally, or
> >
> > (ii) has nominated an agent in British Columbia upon whom process may be served generally,
>
> (c) it has a place of business in British Columbia, or
>
> (d) its central management is exercised in British Columbia.

[25] There is limited analysis in the case law on what is required to show a corporation's central management is exercised in the province: see Catherine Walsh, "General Jurisdiction over Corporate Defendants under the CJPTA: Consistent with International Standards?" (2018) 55:1 Osgoode Hall LJ 163 at 183. In *Stewart* at para. 34, Abrioux J. noted that "[c]entral management is determined based upon the exercise of control over a company, not the management of its day-to-day operations". In *Wheatland Industrial Park Inc. (Re)*, 2013 BCSC 27 at para. 49, the Court found it had jurisdiction over a corporation because its central management rested with two persons who themselves resided in British Columbia, and who acted as its agents in promoting and soliciting sales in British Columbia.

**Real and Substantial Connection**

[26] Section 10 of the *CJPTA* sets out a list of circumstances from which a real and substantial connection is presumed to exist between the province and the facts on which the proceeding is based.

[27] In *The Hershey Company v. Leaf*, 2023 BCCA 264 at para. 12, our Court of Appeal confirmed the two-step analysis articulated in *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 at paras. 16–17:

> (1) At the first stage, the plaintiff must show that one of the connecting factors listed in s. 10 of the *CJTPA* exists. The pleaded jurisdictional facts are presumed to be true. The defendant challenging jurisdiction may contest the pleaded facts with evidence. In that event, the plaintiff is only required to show that there is a good arguable case that the pleaded jurisdictional facts can be proven.
>
> (2) At the second stage, if one of the connecting factors is established either on undisputed pleadings or on disputed pleadings but with a good arguable case, the presumption of a real and substantial connection is triggered. The defendant may then attempt to rebut the presumption by establishing facts showing that the connecting factor does not point to any real relationship between the subject matter of the litigation and the forum, or points to only a weak relationship. The burden on the defendant to rebut the presumption is a heavy one.

[28] Under this two-step framework, the burden is on the plaintiff to establish one of the s. 10 factors. If the plaintiff is successful, they benefit from the presumption of jurisdiction, and the burden shifts to the defendant to rebut the presumption by demonstrating why the established factor suggests either does not disclose or only discloses a weak relationship between the subject matter and forum.

### Forum Non Conveniens

[29] The *CJPTA* addresses *forum non conveniens* in s. 11:

> **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,

2024 BCSC 2345 (CanLII)

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

[30] In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paras. 101–106, the Supreme Court outlined the approach to the *forum non conveniens* analysis. At para. 106, the Court cited *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 at para. 22, for the point that s. 11 of the British Columbia *CJPTA* "was intended to 'codify' *forum non conveniens*".

[31] Where jurisdiction over a defendant is established, the burden shifts to the defendant to demonstrate why the court should decline to exercise its jurisdiction and displace the plaintiff's chosen forum: *Van Breda* at para. 103.

[32] As the Supreme Court set out in *Van Breda* at para. 103, the defendant must:

a) identify an alternative forum with an appropriate connection;

b) establish its connection to the subject matter of the proceeding using the real and substantial connection analysis; and

c) demonstrate why the proposed alternative forum should be preferred and considered more appropriate.

[33] While the *CJPTA* is not explicit on this point, to meet the above test, the defendant must establish that the "alternative forum is clearly more appropriate": *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39 at para. 32, leave to appeal to SCC ref'd, 37492 (8 June 2017), citing *Van Breda* at para. 108. The use of the adverb "clearly" recognizes that once jurisdiction is established, departing from that "normal state of affairs" should not occur from a mere "flipping a coin". Instead, the court "must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation": *Van Breda* at para. 109.

[34] The court must consider the factors enumerated in s. 11(2) in deciding whether an alternative forum is more appropriate: *Giustra v. Twitter, Inc.*, 2021

2024 BCSC 2345 (CanLII)

BCCA 466 at paras. 96–99, 112. While s. 11 makes clear that the factors “must” be considered, those factors are “a non-exhaustive list”: *Garcia* at para. 32. The court is not required to conduct a “numerical tallying up of all the relevant factors”, but it must consider all of the circumstances required by the *CJPTA*: *Giustra* at para. 112.

2024 BCSC 2345 (CanLII)

## DISCUSSION

[35] In the underlying claim there are two allegations made by the plaintiff against the defendants. In the primary allegation, the plaintiff alleges Ricky Trading and Ricky made a fraudulent misrepresentation by "having an intention of not paying for the order", engaged in a breach of trust by not holding the "shipment in trust for the plaintiff until payment for the shipment was made in full to the plaintiff", and converted the alleged funds received from the subsequent sale of the fish products (the "primary claim").

[36] The secondary allegation is that that Ricky Trading or Ricky laundered the misappropriated funds to Canada with the help of Salina, Ho, and Granding (“secondary claim”). It is alleged that the misappropriated funds were used for the "upkeep, maintenance, improvement and acquiring additional equity" in the Richmond Property. As a result, the plaintiff says he has a constructive claim over the Richmond Property. The Applicants say that no material facts are pleaded in support of the allegations in the secondary claim.

[37] Before I address the issues of territorial competence and *forum non conveniens*, it is necessary for me to consider a preliminary issue of whether Ricky Trading attorned to the jurisdiction.

### Has Ricky Trading attorned to the jurisdiction?

[38] The plaintiff submits that, despite being served, Ricky Trading has not challenged this Court’s jurisdiction and therefore has attorned to the jurisdiction of this Court.

[39] The plaintiff asserts that Ricky Trading did not file a jurisdictional response despite being served with a NOCC. On February 8, 2023, the plaintiff obtained a

without notice order from Associate Justice Krentz for alternative service upon the defendants by leaving a copy of the materials at the front door of the Richmond Property. It should be noted that the Applicants do not take issue with service and accordingly have filed a jurisdictional response.

[40] Ricky Trading, however, challenges the plaintiff's assertion that it has attorned to this Court's jurisdiction and argues that because Ricky Trading is in liquidation, according to Hong Kong law, no litigation can be commenced against it with leave of the Court in Hong Kong.

[41] Counsel for the Applicants wrote to the plaintiff's counsel on March 22, 2023 advising that Ricky Trading is the subject of liquidation proceedings in Hong Kong. It appears that the plaintiff might have been aware of this, given that Reliable and the plaintiff are part of the same cooperative. The Applicants' counsel wrote to the plaintiff's counsel again on March 29, 2023 advising them of the liquidation and provided a copy of the winding-up order from the Hong Kong Court. There was no response from the plaintiff's counsel. It is not disputed that the liquidator was not served with the NOCC.

[42] In the meantime in April 2023, counsel for the Applicants forwarded the NOCC to the liquidator in Hong Kong seeking their position. On April 25, 2023, the liquidator, Hou Chung Man (the "liquidator") responded that it was not in a position to provide any comment on the NOCC, citing s. 186 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32), which states "when a winding up order had been made…no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose".

[43] Ricky Trading is, and was at the time the NOCC was filed, being handled by the liquidator. Any attornment would pass through the liquidator, who was not served with the NOCC. Further, based on the Ordinance, the law in Hong Kong does not permit an action against a company who is the subject of a winding up order, except by leave of the court. There is no evidence before me that leave of the Court in Hong

2024 BCSC 2345 (CanLII)

2024 BCSC 2345 (CanLII)

Kong has been sought. Accordingly, I am of the view the Ricky Trading has not attorned to the jurisdiction of this Court.

[44] Next, I will address whether the Court has territorial competence over some of the defendants.

**Does the Court have territorial jurisdiction over the Defendants?**

***Ordinary Residence***

[45] As I have noted earlier in these reasons, Salina and Ho concede that the Court has territorial competence over them because they are individuals ordinarily resident in British Columbia, as described in s. 3(d) of the *CJPTA.* However, they submit that the Court should nonetheless decline to exercise jurisdiction over them and stay the proceeding as against them on the basis of *forum non convenience.*

[46] Ricky and Granding submit that regardless of which standard for territorial jurisdiction is applied, the plaintiff cannot establish the Court has *jurisdiction simpliciter* over them.

[47] While I have determined that Ricky Trading has not attorned to this Court's jurisdiction, I will nonetheless address whether the Court has territorial competence over Ricky Trading, Ricky and Granding.

[48] Ricky submits that none of the conditions under s. 3 of the *CJPTA* apply to him, and hence the Court does not have territorial jurisdiction over him. He argues that, specifically, he is not ordinarily resident in British Columbia, per s. 3(d), nor is there a real and substantial connection, per s. 3(e).

[49] Ricky deposes that he is ordinarily resident in Hong Kong and has operated his import and export business of fish products in Hong Kong. He currently lives in Hong Kong. Ricky immigrated to Canada in 1996 and became a Canadian citizen in 2002, but returned to Hong Kong soon after. After becoming a Canadian citizen, Ricky only came to Canada for relatively short periods to visit his family and friends.

2024 BCSC 2345 (CanLII)

[50] Ricky deposes that he was last in Canada from June 23, 2022 to October 7, 2022. He produced a copy of his boarding pass for his flight back to Hong Kong. Since then, he has not returned to Canada. However, the plaintiff asserts that he saw Ricky in person sometime at the end of January 2023 on two separate occasions. The plaintiff deposes that he saw Ricky and Salina outside the Richmond Property entering into a vehicle. The next day, the plaintiff deposes that he saw Ricky peaking out of the window of the Richmond Property when the plaintiff attempted to serve the defendants with the NOCC. Ricky denies these interactions.

[51] In my view, even if Ricky was present in Canada on those two occasions, it does not establish that he is ordinarily resident in British Columbia. Based on all of the evidence, I conclude that Ricky was not ordinarily resident in British Columbia at the time of the commencement of the proceeding.

[52] A corporation is considered ordinarily resident in BC if any one of the listed factors under s. 7 of the *CJTPA* are found.

[53] As I have noted, Ricky Trading is a company registered in Hong Kong. Its business is in Hong Kong. There is no evidence that Ricky Trading has a registered office in BC, nor does it have a place of business in BC. Finally, given that I have concluded that Ricky is not ordinarily resident in BC, I conclude that Ricky Trading's central management is not exercised in BC.

[54] However, the situation is different as it relates to Granding. Ho is the sole director of Granding. I accept that Granding is merely a shell company, does not have or is not required to have a registered office in BC and does not have a place of business in BC or elsewhere. However, I am not convinced that Granding's central management is not exercised in BC. Unlike Ricky, who I found is not ordinarily resident in BC, Ho has conceded that he is ordinarily resident in BC.

[55] Central management is determined based on the exercise of control over a company, not the management of its day-to-day operations: *Stewart* at para. 34. Thus, even if a corporation was not actually conducting business in BC, the question

for central management is the residency of the individual who controls the corporation.

[56] In *Right Business Ltd. v Affluent Public Ltd*, 2011 BCSC 783, the plaintiffs argued that Mr. Chang, who was resident of BC, was the “controlling mind” of the two corporations in question and thus exercised their central management in BC: at para. 36. The Court agreed, stating that “Chang exercises a significant degree of control over the various companies”, and was a director of the corporation to whom service could be affected, thereby triggering both s. 7(b) and (d): at para. 40. The Court’s focus in this analysis was less about the business that was conducted in Vancouver, if any. It centred on who had control of the central management of the corporations.

[57] Similarly, in *Liang v Barnard*, 2023 BCSC 219, Justice Edelmann undertook an analysis of the evidence pertaining to the residency of the various directors of the two defendant corporations. The residency was central to the question of where the central management of the corporations was exercised. While the corporations were registered in Alberta, the records showed the directors had Vancouver addresses. Justice Edelmann found both corporations were ordinarily resident in BC: see paras. 10–21.

[58] The same can be said for Granding. Ho is the sole director of Granding and thus the sole individual who can effect control over the corporation, despite it being a shell.

[59] I therefore conclude that this Court has territorial competence over Granding pursuant to s. 7(d) of the *CJPTA*.

***Real and Substantial Connection***

[60] I have found I have territorial competence over Ho, Salina, and Granding pursuant to s. 3(d) of the *CJPTA*. However, I have found I do not have territorial competence over Ricky and Ricky Trading on that basis. I therefore proceed in this

2024 BCSC 2345 (CanLII)

section to consider whether there is a real and substantial connection between the province and the facts on which the proceeding against the defendants are based.

[61] Section 10 of the *CJPTA* sets out a non-exhaustive list of factors that guide the determination of whether a real and substantial connection exists. The plaintiff says he has established one of the factors set out s. 10:

> **10** Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding
>
> (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,

[62] Counsel for the plaintiff, in his oral and written submissions, also relies on s. 10(f):

> (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,

[63] The Applicants take issue with the plaintiff's reliance on s. 10(f), as it was not pleaded in the plaintiff's application response. The Applicants argue that the plaintiff should not be entitled to rely on it. I agree. As such, I will only address the plaintiff's claim that has been brought to assert, declare or determine proprietary or possessory rights to and a security interest in the Richmond Property.

[64] The plaintiff asserts that he has pleaded jurisdictional facts, which are presumed to be true, that Ricky received funds from the Chinese buyers for the fish products but failed to pay the plaintiff. The plaintiff has further pleaded that Ho, Salina and Granding received the misappropriated funds from Ricky and converted them to their personal benefit for the upkeep, maintenance, and improvement of the Richmond Property and to acquire additional equity therein. Based on this misappropriation, the plaintiff submits that Ricky holds the Richmond Property in a constructive trust for the benefit of the plaintiff. Alternatively, the plaintiff pleaded that Ho did not have a juristic reason to receive the funds and has been unjustly

2024 BCSC 2345 (CanLII)

enriched. As such, Ho holds the property on a constructive trust for the benefit of the plaintiff. Finally, in the further alternative, the plaintiff pleaded that Ho was only a nominee of Ricky on title to the Richmond Property. As such, Ricky holds the Richmond Property in trust for the plaintiff.

2024 BCSC 2345 (CanLII)

[65] In my view, the plaintiff's pleaded facts invoke, on their face, a real and substantial connection pursuant to s. 10(a) of the *CJPTA*. As noted in *Hershey* at para. 12, at the first stage of the analysis, the defendant challenging jurisdiction may contest the pleaded facts with evidence.

[66] Where a defendant contradicts the pleaded facts, the plaintiff is required to show that there is a good arguable case that the pleaded jurisdictional facts can be proven. When assessing the good arguable case standard, the court must be mindful that it would be unfair to impose too heavy an evidentiary burden on the plaintiff when there has been no opportunity for discovery: *AG Armeno Mines and Minerals Inc. v. Newmont Gold Co.*, 2000 BCCA 405 at para. 25. The Court's comments in *Ecolab Ltd. v. Greenspace Services Ltd.*, 38 O.R. (3d) 145 at 153, 1998 CanLII 17738 (Div. Ct.) are instructive on this point:

> The court must not blindly accept the plaintiff's assertion that there is a cause of action. . . . The court itself must decide whether or not a proper cause of action has been alleged. . .[T]he threshold test is low. A "good arguable case" is no higher than a "serious question to be tried" or a "genuine issue" or "with some chance of success".

[67] The Applicants characterize the plaintiff's allegations of misappropriation as bald and meritless assertions. They argue there is no evidence of the misappropriation. They further argue that Ricky, Ricky Trading and Granding have no ownership interest in the Richmond Property. The Applicants have provided affidavit evidence from Ricky and Ho to dispute the plaintiff's pleaded facts. Further, the Applicants submit that to the extent that the plaintiff has made a claim to the Richmond Property, it is against Ho and none of the other defendants, given that he is the registered and beneficial owner.

[68] Ho deposes that Ricky is not the beneficial owner of the Richmond Property. Land title documents show that Ho is the sole registered owner and has a mortgage on the Richmond Property with the Royal Bank of Canada. Ho further deposes that he is solely responsible for the mortgage and he himself makes the monthly mortgage payments. Since March 2019, when he ceased to be a director of Ricky Trading, Ho deposes that he has not received any funds from Ricky Trading. Since purchasing the Richmond Property, Ricky Trading has not made any payments towards its mortgage.

[69] The plaintiff submits that Ho has not addressed his source of income from where he makes his mortgage payments. While it would have assisted the Court, I am not convinced that this fundamentally weakens the Applicants' position, nor does it undermine the evidence submitted to contest the plaintiff's pleadings. However, it is noteworthy that Ho has not stated that he did not receive funds from Ricky, as distinct from Ricky Trading. Similarly, Ricky did not provide any evidence on this point.

[70] In light of the pleadings and the evidence submitted, I am unable to find that the plaintiffs have established a good arguable case that the pleaded jurisdictional facts can be proven. While I recognize that the threshold for a good arguable case is a low one, the Applicants have provided evidence that directly contradicts the facts underlying the plaintiff's claim of misappropriation of funds. The plaintiff has failed to show, in light of that evidence, a good arguable case.

[71] Even if there was, on the disputed pleadings, a good arguable case, I find that the Applicants have rebutted the presumption of a real and substantial connection at the second stage of the analysis. There is a weak relationship between the province and the plaintiff's secondary claim for misappropriation of funds.

[72] First, the plaintiff essentially seeks to bootstrap its claim against Ho and the Richmond Property to its claim against Ricky and Ricky Trading. A plaintiff must establish territorial competence against each party, and cannot "bootstrap" its claim against the defendants by establishing jurisdiction against a different party: *Williams*

2024 BCSC 2345 (CanLII)

2024 BCSC 2345 (CanLII)

*v. TST Porter dba 6422217 Canada Inc.,* 2008 BCSC 1315 at para. 17; *Lailey v. International Student Volunteers, Inc.,* 2008 BCSC 1344 at para. 34.

[73] Second, the claim for misappropriation of funds, which is the part of its claim on which the plaintiff bases the real and substantial connection to BC, is entirely contingent on the success of the primary claim of fraud and misrepresentation by Ricky and Ricky Trading in respect of the sale of fish products in Hong Kong. The primary claim discloses no connection to BC. This renders the connection in the secondary claim extremely tenuous.

[74] In my view, the plaintiff has not established territorial competence over Ricky or Ricky Trading.

**Should the Court decline jurisdiction on the basis of forum non conveniens?**

[75] The Applicants contend that even if this Court were to find that it has territorial competence, the Court should nonetheless exercise its discretion and decline jurisdiction over all the defendants on the basis of *forum non conveniens*.

[76] 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.

[77] I am mindful of the plaintiff's *prima facie* right to its chosen forum: *Medicane Health Incorporated v. Bar Tal*, 2021 BCSC 734 at para. 66.

[78] The Applicants submit that Hong Kong is clearly more appropriate to hear the primary claim asserted by the plaintiff. The Applicants argue that there is no connection between the causes of action pleaded and the province, other than the allegations of the misappropriation of the funds for the upkeep and maintenance of the Richmond Property. I agree that the core of the dispute involves allegations against Ricky Trading, a company doing business in and located in Hong Kong. I reiterate that the secondary claim is dependent on the success of the primary claim.

[79] I find that this dependency between the claims is critical. Unless the plaintiff is successful on the claim for fraud and misrepresentation, he cannot succeed on the claim for misappropriation of funds. More specifically, without a finding that Ricky Trading received payment from the Chinese buyers and then failed to pay for the fish order, there can be no finding that Ricky and/or Ricky Trading misappropriated funds for the upkeep of the Richmond Property. As such, my analysis on whether to this Court should exercise its discretion and decline to exercise its territorial competence pursuant s. 11 of the *CJPTA* must focus on the primary claim for fraud and misrepresentation.

2024 BCSC 2345 (CanLII)

[80] Under the *forum non conveniens* analysis, the court must consider the factors set out in s. 11(2) of the *CJPTA* to determine whether Hong Kong is clearly the more appropriate forum. I will address each factor in turn.

***Comparative convenience and expense***

[81] With respect to the issue of comparative convenience and expense, the relevant common law factors include where each party resides, where each party carries on business, the convenience or inconvenience of witnesses and the costs of conducting the litigation in this jurisdiction.

[82] Only Ho and Salina reside in British Columbia. I have already determined that Ricky is not ordinarily resident in BC, although he is a Canadian citizen, and prior to October 2022 regularly came to BC to visit his family. The plaintiff resides in India.

[83] Ricky Trading carries on business in Hong Kong. The liquidator and its counsel are also located in Hong Kong. While Granding is nothing more than a shell company and does not carry on any business, its central management is exercised in BC, given that Ho resides in BC. The plaintiff’s company is located in India.

[84] With respect to the primary claim, Ricky is no longer in control of Ricky Trading, which has now been assumed by the liquidator. The witnesses would necessarily also be in Hong Kong, including the Chinese buyers. I also surmise that many of the documents, such as banking documents and invoices, are in Chinese.

The added cost of translating them to English is an expense that both parties would have to incur. This would not be the case if the matter were heard in Hong Kong.

[85] The plaintiff argues that banking records relating to the upkeep of the Richmond Property are located in BC. In my view this relates to the secondary claim, which is dependent on success of the primary claim. The banking records that would be relevant to the primary claim are clearly in Hong Kong.

[86] In considering all the circumstances under this category, this factor weighs in favour of Hong Kong as the more appropriate forum.

***The law to be applied to the proceeding***

[87] With respect to the question of which law is to be applied, the relevant common law factors are where the cause of action arose, where the loss or damage occurred, the applicable substantive law and the difficulty of proving foreign law, if necessary.

[88] The nonpayment and the alleged fraud and misrepresentation occurred in Hong Kong. The primary cause of action arose in Hong Kong, and there is no dispute that the loss or damage also occurred in Hong Kong.

[89] I find that the substantive law that would be applied in the primary claim is that of Hong Kong. This factor favours Hong Kong as the more appropriate forum.

***Avoiding multiple legal proceedings and conflicting decisions in different courts***

[90] These two statutory factors concern the desirability of avoiding a multiplicity of legal proceedings and conflicting decisions in different courts. Related common law factors are the existence of parallel proceedings and the legitimate juridical advantages and disadvantages in the competing jurisdictions.

[91] As noted earlier, Ricky Trading has instituted proceedings in Hong Kong against the Chinese buyers for nonpayment of the delivery of the fish products that originated from the plaintiff. This litigation has been assumed by the liquidator and,

2024 BCSC 2345 (CanLII)

in my view, is connected to the primary claim advanced by the plaintiff. I agree with the Applicants that allowing this proceeding to continue in BC would risk conflicting decisions.

[92] While the winding up and liquidation is not *per se* a parallel proceeding, the plaintiff has chosen to ignore the laws of Hong Kong that prevent initiation of proceedings where a company is in liquidation. Not only did the plaintiff fail to serve the liquidator with the NOCC, it also did not seek an order from the courts in Hong Kong to advance these proceedings. There is no evidence that any judgement against Ricky Trading in this province would be difficult or unfeasible to enforce in Hong Kong on this basis. However, the plaintiff cannot circumvent the Hong Kong law prohibiting claims against a corporation in liquidation by pursuing the claim in another jurisdiction. The plaintiff has not provided any evidence that this prohibition would not apply to litigation commenced in this jurisdiction.

***Enforcement of an eventual judgement***

[93] The plaintiff says that orders made by this Court regarding the Richmond Property and misappropriated funds will make enforcement significantly easier. However, once again, this secondary claim is contingent on the success of the primary claim. If the primary claim were to be litigated in Hong Kong and the plaintiff were successful, there is no reason that it could not then pursue the secondary claim in this province.

***Fair and efficient working of the Canadian legal system***

[94] This factor is only relevant in matters involving a choice between different courts in Canada: *Rotor Maxx Support Limited v. Air Palace Co. Ltd.*, 2020 BCSC 1321 at para. 110, citing *Schwarzinger v. Bramwell*, 2011 BCSC 283 at para. 101; *International Raw Materials Ltd. v. Steadfast Insurance Company*, 2023 BCSC 1389 at para. 76.

[95] On the balance, I find that the factors listed in s. 11(2) weigh in favour of Hong Kong as the clearly appropriate forum.

2024 BCSC 2345 (CanLII)

2024 BCSC 2345 (CanLII)

## CONCLUSION

[96] In conclusion, I find that this Court has jurisdiction over Ho, Salina, and Granding. However, this Court does not have jurisdiction over Ricky or Ricky Trading. The claims against Ricky Mak and Ricky Trading are dismissed on that basis.

[97] With respect to the claims against Ho, Salina, and Granding, I decline to exercise my jurisdiction and opt to enter a stay of proceedings on the claims against them. I am satisfied that Hong Kong is clearly the more appropriate forum for the resolution of these claims.

[98] If the parties are unable to agree with respect to the issue of costs, they are at liberty to apply with respect to that issue within 60 days of these reasons.

“Girn J.”