Clerk's Stamp

COURT FILE NUMBERS	B201-979735 / 25-2979735
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED
	AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
APPLICANTS	TRAFIGURA CANADA LIMITED and SIGNAL ALPHA C4 LIMITED
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS, Trafigura Canada Limited and Signal Alpha C4 Limited**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Stikeman Elliott LLP
Barristers & Solicitors
4200 Bankers Hall West
888-3rd Street SW
Calgary, AB T2P 5C5

Karen Fellowes, K.C. / Natasha Doelman

Tel: (403) 724-9469 / (403) 781-9196
Fax: (403) 266-9034
Email: kfellowes@stikeman.com / ndoelman@stikeman.com

Lawyers for the Applicants,
Trafigura Canada Limited and Signal Alpha C4 Limited

File No.: 137093.1011

Hearing via Webex before the Honourable Justice Whitling
on the Edmonton Commercial List, on November 28, 2023, commencing at 10:00 a.m.

TABLE OF CONTENTS

Page

I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicants, Trafigura Canada Limited ("**Trafigura**") and Signal Alpha C4 Limited ("**Signal**" and collectively, the "**Lenders**"), who are the largest and primary secured creditors in these proceedings (the "**NOI Proceedings**") commenced by Griffon Partners Operation Corp. ("**GPOC**"), Griffon Partners Capital Management Ltd. ("**GPCM**"), Griffon Partners Holding Corp. ("**GPHC**"), Spicelo Limited ("**Spicelo**"), Stellion Limited ("**Stellion**"), 2437801 Alberta Ltd. ("**2437801**"), 2437799 Alberta Ltd. ("**2437799**"), and 2437815 Alberta Ltd. ("**2437815**") (collectively, the "**Debtors**").

2. The Lenders' priority secured interest arises from a Loan Agreement dated July 21, 2022, in which the Lenders advanced USD$35,869,565.21 (the "**Loan Agreement**") to GPOC to purchase certain oil and gas assets. As security for payment and performance of GPOC's obligations under the Loan Agreement, a total of seven corporate guarantees were entered into with the other Debtors. In the case of Spicelo, a Limited Recourse Guarantee and Securities Pledge Agreement dated July 21, 2022 (the "**Share Pledge**"), was entered into with respect to certain shares (the "**Pledged Shares**") in the capital of Greenfire Resources Ltd. ("**Greenfire**") owned by Spicelo.

3. In the event of default on the Loan Agreement, the Lenders are entitled to call upon the Share Pledge as a separate and distinct obligation. On August 16, 2023, the Lenders sent a demand to Spicelo (among others) following continued defaults on the Loan Agreement. On August 25, 2023, the Debtors commenced these NOI Proceedings.

4. The Pledged Shares were specifically pledged to the Lenders in the event of default on the part of GPOC. No other creditor in these NOI Proceedings has recourse to these assets. For this reason, the Lenders have consistently argued that the Pledged Shares should be carved out of these NOI Proceedings and be utilized to resolve the outstanding indebtedness owing to the Lenders.

5. A dispute has arisen between the Lenders, on the one hand, and the Debtors and Proposal Trustee, on the other, about whether the Pledged Shares can be sold during the Lock-up Period (as defined in paragraph 22) agreed to by Spicelo pursuant to a Lock Up Agreement dated September 20, 2023 (the "**LUA**") among Spicelo, Greenfire and other unrelated entities. The Lenders are not party to the LUA.

6. The Proposal Trustee and Debtors have previously contended before this Court, without evidence or basis in law, that the Pledged Shares are illiquid due to the LUA and the Lenders are therefore prohibited from realizing on the Pledged Shares and transferring them, in whole or in part, to any third party during the Lock-up Period. In doing so, the Proposal Trustee and Debtors were able to reassure this Court as to the appropriateness of including the Pledged Shares in the NOI Proceedings insofar as the Lenders would not be able to realize on their security in any event. The

Lenders strenuously objected to the submissions of the Proposal Trustee and the Debtors in this regard, but the Court nonetheless accepted their submissions in rejecting the Lenders' contention to exclude the Pledged Shares from the NOI Proceedings.

7. The LUA and related Shareholder Support Agreement (the "**SSA**") are each governed by Delaware law. As a result, in advance of this hearing, the Lenders obtained a legal memorandum from the law firm Troutman Pepper Hamilton Sanders LLP ("**Troutman Pepper**") confirming that pursuant to Delaware Law, the Lenders are not constrained by the terms of the LUA or SSA (directly or indirectly through incorporation of its terms and conditions in the LUA). The details of the Troutman Pepper legal memorandum are further discussed in Part IV below.

8. The Lenders seek a declaration from this Court that the sale restrictions contained in the LUA have no application to the Lenders' security interest in the Pledged Shares or ability to realize on the Pledged Shares (but for the existence of these NOI Proceedings themselves). The Lenders are empowered by virtue of the terms of the Share Pledge to dispose of the Pledged Shares and should be entitled to exercise their discretion in so doing and not be improperly impeded by the application of contractual restraints on such transfers in the LUA and SSA. The Lenders believe that a declaration from this Court with respect to the interpretation and application of the LUA must be settled in advance of any future application the Lenders might bring related to Spicelo to terminate these NOI Proceedings and/or appoint a receiver over the Pledged Shares.

II. STATEMENT OF FACTS

A. The Parties

9. The Lenders are the largest and primary secured creditors of GPOC, GPCM and GPHC (collectively, the "**Griffon Entities**"). The Lenders also have a priority secured interest in Stellion, 2437801, 2437799, and 2437815 (collectively, the "**Shareholder Entities**"), which are holding companies, and each legally or beneficially owned by one of the four directors of GPOC.[1]

10. GPOC is a small oil and gas company with a few producing assets in the Viking formation in Saskatchewan (the "**GPOC Assets**").[2] GPOC operates the GPOC Assets through a small group of contractors [3] The value of the GPOC Assets is uncertain, but as of August 2023, the highest enterprise valuation based on a previous estimate from ARCO Capital Partners (as part of its efforts to refinance and/or restructure GPOC) was between $25,000,000 to $30,000,00, and subject to commodity pricing and risk.[4]

[1] Affidavit of Dave Gallagher, sworn November 20, 2023 at para 7 [Gallagher Affidavit].
[2] *Ibid* at para 8.
[3] *Ibid*.
[4] *Ibid*.

11. GPHC and GPCM are each holding companies, have no assets other than their direct or indirect ownership in GPOC, and do not carry on any active business operations. None of the Griffon Entities have employees.[5]

12. Spicelo is unrelated to the Griffon Entities and Shareholder Entities and does not have employees or carry on any active business operations. Spicelo's most significant asset is 1,125,002 common shares in the capital of Greenfire (to be exchanged for 5,499,506 shares in the capital of Greenfire (before and after such exchange being referred to as the "**Pledged Shares**"), a publicly traded company on the New York Stock Exchange ("**NYSE**"). Unlike the other Debtors (excluding GPOC), Spicelo is not a direct or indirect shareholder of GPOC.[6]

B. The Indebtedness

13. On July 21, 2022, the Lenders entered into a loan agreement with the Griffon Entities (the "**Loan Agreement**") pursuant to which the Lenders agreed to loan the sum of USD$35,869,565.21 to GPOC (the "**Loan**") to fund the acquisition of the GPOC Assets from Tamarack Valley Energy Ltd. ("**Tamarack**") (the "**Transaction**"). The Transaction was fully financed by the Lenders and by the subordinate secured creditor, Tamarack, with the shareholders of GPOC contributing no cash equity to the Transaction.[7]

14. As the GPOC Assets were insufficient to fully collateralize the Loan, it was agreed that the Lenders would receive the following additional security pursuant to the Loan Agreement:

    (a) a fixed and floating charge debenture over all GPOC's present and future real and personal property (the "**GPOC Debenture**");[8]

    (b) seven corporate guarantees would be provided from GPCM, GPHC, Spicelo, Stellion, 2437801, 2437799, and 2437815 (collectively, the "**Guarantors**" and each a "**Guarantor**") as security for payment and performance of all GPOC's obligations under the Loan Agreement; and

    (c) the Share Pledge from Spicelo with respect to the Pledged Shares and the Special Dividend (as defined below).[9]

15. The Loan Agreement went into default within four months of its advance. On November 1, 2022, GPOC defaulted on the Loan Agreement by failing to meet mandatory principal amortization

[5] Gallagher Affidavit, *supra* note 1 at para 9.
[6] *Ibid* at para 10.
[7] *Ibid* at para 12.
[8] *Ibid* at para 13(a).
[9] *Ibid* at para 13(c).

payments as required under section 2.5(2) of the Loan Agreement. The Loan Agreement remains in default to the present date.[10]

16. As of August 16, 2023, the Lenders were owed USD$37,938,054.69, plus legal fees, costs, expenses and other charges which are due and payable pursuant to the terms of the Loan (collectively, the "**Indebtedness**"). The Indebtedness represents 68% (C$51,413,652.14 of C$75,681,542.85) of the claims of GPOC and substantially all the claims of the other Debtors in these NOI Proceedings.[11]

C. Spicelo and Pledged Shares

17. Spicelo's only significant asset is the Pledged Shares. The Pledged Shares represent a key component of the collateral pledged to the Lenders as security for the Loan as neither GPOC nor the Guarantors contributed cash equity to the Transaction and the GPOC Assets were insufficient to fully collateralize the Loan. No other creditor in these NOI Proceedings have recourse to the Pledged Shares.[12]

18. The Pledged Shares have significant value. The shares of Greenfire, including the Pledged Shares, recently participated in a transaction (the "**Greenfire Transaction**") whereby, among other things, these shares were arranged into new shares of a special purpose vehicle (the "**New Greenfire Shares**") pursuant to a statutory plan of arrangement and in connection with a business combination, and as of September 20, 2023, such New Greenfire Shares (including the Pledged Shares) were listed and posted for trading on the NYSE. On the day of the public listing on September 21, 2023, the estimated fair market value of the listed shares was USD$10.10/share, implying a Pledged Share value of USD$55,545,010.60. The Pledged Shares are also entitled to a special dividend in the amount of USD $6,600,000 (the "**Special Dividend**"), and to which the Lenders are entitled to by virtue of the Share Pledge.[13]

19. As of September 21, 2023, the estimated value of the Pledged Shares and the special dividend was USD$62,200,000, or approximately C$84,900,000. When the Lenders issued their demand for repayment in August 2023, a sale of the Pledged Shares alone would have been sufficient to see the Indebtedness paid off.[14] However, since the commencement of these NOI Proceedings, the value of the Pledged Shares has fluctuated from a high of $10.10 USD/share (upon listing September 21, 2023) to just over USD$4.00 per share (October 3, 2023). On November 20, 2023, the value of the Pledged Shares was USD$6.11 per share. These fluctuations have raised concerns

[10] Gallagher Affidavit, *supra* note 1 at para 14.
[11] *Ibid* at para 15.
[12] *Ibid* at para 16.
[13] *Ibid* at para 17.
[14] *Ibid* at para 18.

that the Lenders may be exposed to becoming undersecured, should the price of the Pledged Shares fall even further.

D. Sale Restrictions on Pledged Shares

20. The Lenders, on the one hand, and the Debtors and Proposal Trustee, on the other hand, disagree about whether the Pledged Shares can be sold during the Lock-up Period under the LUA for the purpose of resolving the Indebtedness.

21. The Greenfire Transaction was contemplated at least as early as December 2022 and, pursuant to the SSA dated December 14, 2022, Spicelo agreed to support the Greenfire Transaction, by, amongst other things, entering into a LUA on the effective date of the Greenfire Transaction (September 20, 2023).[15]

22. At the closing of the Greenfire Transaction, the LUA became effective. The LUA was entered into between certain Company Holders (as defined therein and including Spicelo) and Greenfire.[16] The LUA restricts the Company Holders', including Spicelo, ability to transfer the New Pledged Shares for, among other things, a period of 180 days following September 20, 2023 (expiring March 18, 2024) (the "**Lock-up Period**").[17] However, both the LUA and the SSA provide certain exceptions to the Lock-up Period imposed thereby. Such applicable exemptions include, but are not limited to, the exceptions provided in Section 1.2 of the SSA relating to "Existing Liens" and Sections 2(b)(vii) and 2(b)(xii) of the LUA.[18]

E. NOI Proceedings

23. On September 22, 2023, the Debtors brought an application to, among other things, extend the time for filing a Proposal to November 8, 2023. At the hearing of this application the Lenders agreed that the Debtors (except Spicelo) should be entitled to a 45-day extension. However, the Lenders argued that Spicelo should be carved out of these NOI Proceedings. The basis for this position was that the Pledged Shares are Spicelo's only asset and those assets were pledged exclusively to the Lenders. The terms of the Share Pledge permit the Lenders to appoint a receiver over Spicelo in the event of default. Therefore, if the Court declined to grant an extension of the initial stay of proceedings (by reason of termination or expiry), the Lenders would be able to appoint a receiver over Spicelo and thus prepared a receivership application for that eventuality. However, the Court extended the stay for the Debtors (including Spicelo), and the receivership application was therefore never decided on its merits.

---

[15] Gallagher Affidavit, *supra* note 1 at para 19.
[16] *Ibid* at para 20.
[17] *Ibid* at para 21.
[18] *Ibid* at para 22.

24. On October 18, 2023, the Debtors brought an application for approval of a sale and investment solicitation process ("**SISP**"). While the Lenders conceded that a SISP was necessary with respect to the GPOC Assets, the Lenders took exception to the lengthy timelines proposed by the Debtors. Nonetheless, the SISP was ultimately granted by the Court.

25. On November 8, 2023, the Debtors brought an application for (i) a further extension of the stay of proceedings to December 23, 2023, (ii) approval of a key employee retention program ("**KERP**") and related charge, and (iii) approval of the Proposal Trustee's fees and its counsel's fees. The Lenders supported the extension of the stay of proceedings, but opposed the relief sought in relation to the KERP and the Proposal Trustee's fees. The Court granted the extension of the stay to December 23, 2023, and the approval of the Proposal Trustee and its counsel's fees. However, the Court declined to grant the KERP and related charge.

III. ISSUES

26. The issues to be determined by this Court are as follows:

(a) whether the Alberta Court of King's Bench is the appropriate forum to determine the issues related to the sale restrictions in the LUA;

(b) whether the Lenders are constrained by the sale restrictions contained in the LUA; and

(c) in the alternative, if the LUA applies, whether the Lenders nevertheless meet the exemptions set out in the LUA.

IV. LAW AND ARGUMENT

A. Alberta is the appropriate forum to decide this Application

27. In order to establish that this Court is the appropriate forum to decide this Application, it must be established that this Court has jurisdiction *simpliciter* and that this Court is clearly the more appropriate forum under the *forum non conveniens* analysis. In *Deadman v Jager Estate*,[19] the Alberta Court of Appeal stated the following regarding jurisdiction analyses:

> 12 … The analysis of jurisdiction *simpliciter* establishes a minimum threshold to determine whether a court has jurisdiction, on the basis that a "real and substantial connection" exists between the chosen forum and the subject matter of the litigation. The *forum non conveniens* analysis addresses whether a court with jurisdiction *simpliciter*

[19] 2019 ABCA 481 [*Jager*].

should nevertheless decline to exercise that jurisdiction in favour of a "clearly more appropriate forum".

13 The test for jurisdiction *simpliciter* is intended to establish a minimum threshold for the assumption of jurisdiction. When an application to challenge jurisdiction is brought, the onus is on the plaintiff to establish jurisdiction *simpliciter* by demonstrating the presence of presumptive connecting factors, which establish a real and substantial connection between the facts on which the claim is based and the chosen forum, entitling the court to assume jurisdiction over the dispute. The defendant can rebut the presumed jurisdiction by establishing facts which demonstrate that the presumptive connecting factors do not point to any real relationship, or only a weak relationship, between the subject matter of the litigation and the forum. If the defendant fails to do so, jurisdiction *simpliciter* is established.

14 Jurisdiction *simpliciter* establishes only that the court has jurisdiction, not that it should exercise it. The *forum non conveniens* analysis permits a defendant to show why the court should decline to exercise its jurisdiction in favour of another forum that also has a real and substantive connection under conflicts rules, but which is a more appropriate forum to dispose of the action.[20]

28. In assessing jurisdiction *simpliciter*, courts look to various connecting factors to demonstrate a real and substantial connection. In *Club Resorts Ltd v Van Breda*[21] ("***Van Breda***"), the Supreme Court of Canada identified the following non-exhaustive list of connecting factors:

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

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

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

(d) a contract connected with the dispute was made in the province.[22]

29. In Alberta, courts have also looked to Rule 11.25(3) of the *Rules of Court*[23] to identify potential connecting factors.[24] Rule 11.25(3) establishes that a real and substantial connection is presumed to exist in the following circumstances:

[20] *Ibid* at paras 12-14.
[21] 2012 SCC 17 [*Van Breda*].
[22] *Ibid* at para 90.
[23] Alta Reg 124/2010.
[24] See e.g., *Jager*, *supra* note 19 at paras 19-20.

(a) the claim relates to land in Alberta;

(b) the claim relates to a contract or alleged contract made, performed or breached in Alberta;

(c) the claim is governed by the law of Alberta;

(d) the claim relates to a tort committed in Alberta;

(e) the claim relates to the enforcement of security against property other than land by the sale, possession or recovery of the property in Alberta;

(f) the claim relates to an injunction in which a person is to do or to refrain from doing something in Alberta;

(g) the defendant is resident in Alberta;

(h) the claim relates to the administration of an estate and the deceased died while ordinarily resident in Alberta;

(i) the defendant, although outside Alberta, is a necessary or proper party to the action brought against another person who was served in Alberta;

(j) the claim is brought against a trustee in relation to the carrying out of a trust in certain enumerated circumstances; or

(k) the action relates to a breach of an equitable duty in Alberta.

30. These connecting factors are not conjunctive; the presence of just one connecting factor is enough to establish jurisdiction *simpliciter*.[25]

31. Furthermore, plaintiffs who commence a proceeding thereby submit to the courts of that jurisdiction to determine all matters properly pertaining to that proceeding.[26] Alberta courts have held that once a party commences an action in Alberta, it must "live with the consequences of that action."[27] The Alberta Court of Appeal has also held that "once a defendant is properly served within the province, the Alberta courts have jurisdiction."[28] In these situations, jurisdiction *simpliciter* is therefore established and the analysis continues to *forum non conveniens*.

[25] *Van Breda*, *supra* note 21 at para 93.
[26] See e.g., *1297835 Alberta Ltd v Xtreme Coil Drilling Corp*, 2010 ABQB 539 at para 30 [*Xtreme*]; *Han v Cho*, 2006 BCSC 1623 at para 59.
[27] *K-Lath v Gemini Structural Systems Inc*, 1997 ABCA 256 at para 12; *Xtreme*, *supra* note 26 at para 30.
[28] *Dyck v Questrade Inc*, 2012 ABCA 187 at para 5 [*Dyck*].

32. In *Van Breda*, the Supreme Court of Canada identified the following non-exhaustive list of factors to be considered when determining if another forum is the more appropriate forum:

(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.[29]

33. In this case, Spicelo commenced the NOI Proceeding in Alberta and has thus submitted to the jurisdiction of this Court over all matters pertaining thereto, including this Application. Spicelo has also been properly served within Alberta and has thus acceded to the jurisdiction of this Court. Nonetheless, there are also several connecting factors present that demonstrate a real and substantial connection between Alberta and the matters in this Application. Spicelo is extra-provincially registered in Alberta and its only asset, the Pledged Shares, is shares in an Alberta corporation. As such, Spicelo carries on business within Alberta. Additionally, this Application centers around "the enforcement of security against property other than land by the sale, possession or recovery of the property in Alberta."

34. It must be acknowledged that the LUA, SSA and BCA all contain provisions stating that all disputes related to those three agreements must be brought in Delaware.[30] However, foreign jurisdiction clauses such as these are not solely determinative of the issue of jurisdiction and are instead but one factor that is considered by the courts. In *Volkswagen Canada Inc v Auto Haus Frohlich Ltd*,[31] the appellant argued that a clause in the relevant contract granting exclusive jurisdiction to the courts of Ontario ousted the jurisdiction of the courts of Alberta to hear the matter.[32] In response to this argument, the Alberta Court of Appeal stated that "(o)ne can no more oust jurisdiction by

[29] *Van Breda*, *supra* note 21 at para 105.
[30] Gallagher Affidavit, *supra* note 1, Appendix J, s 3(b) [*LUA*]; Gallagher Affidavit, *supra* note 1, Appendix I, s 3.3(a) [*SSA*]; Gallagher Affidavit, *supra* note 1, Appendix G, s 11.16 [*BCA*].
[31] 1985 ABCA 223.
[32] *Ibid* at para 4.

consent than confer jurisdiction by consent."[33] In the face of a foreign jurisdiction clause, a matter should still be heard in Alberta if the balance of convenience favours it.[34]

35. Pursuant to Section 3(a) of the LUA, Section 3.2 of the SSA, and Section 11.5 of the BCA, the governing law of all three agreements is also that of the State of Delaware. Though the LUA, SSA, and BCA are properly governed by Delaware law, that is not a bar to this Court interpreting these agreements and deciding the issues in this Application; the proper law of the contract is but one factor that is considered in determining whether Alberta is the appropriate forum.

36. As such, this Court has jurisdiction to hear this Application as long as the balance of convenience favours Alberta as the most appropriate forum. Aside from the foreign jurisdiction and governing law clauses, there are no factors that point to Delaware being the more appropriate forum to determine the issues in this Application. The balance of convenience clearly favours allowing this litigation to continue in Alberta.

37. The Greenfire Transaction was closed in Alberta and centers around Greenfire, an Alberta corporation with assets in Alberta. Spicelo is a holding corporation registered in Cyprus but has extra-provincial registration in Alberta and its only asset is the Pledged Shares. Counsel for all parties involved in this Application are located in Alberta. None of the parties involved in this dispute have any ties to Delaware. It is thus far more convenient and cost-efficient for all parties to have these issues decided by this Court. Allowing this application to be decided by this Court as part of the broader NOI Proceedings instead of having a fresh proceeding commenced in Delaware avoids creating a multiplicity of proceedings and forcing the parties to incur unnecessary expenses. Lastly, any judgment rendered would have to be enforced in Alberta as the property at the heart of this Application, the Pledged Shares, is in Alberta. Requiring the Lenders to apply for relief in Delaware and then attempt to enforce a foreign judgment in Alberta adds unnecessary complexity and expense.

38. This Court has jurisdiction to decide the issues in this Application and is clearly the most appropriate forum for doing so. The fact that the governing law of the contract is Delaware law is no barrier. Canadian courts have consistently held that courts can rule on matters governed by foreign law so long as evidence on the relevant foreign law has been adduced. For example, in *Royal Bank v Neher*,[35] this Court stated that "an issue about what the laws of a foreign jurisdiction are is a question of fact and is accordingly a matter of evidence."[36]

---

[33] *Ibid*.
[34] *Ibid* at para 6; *Dyck*, *supra* note 28; *Swimwear Etc v Raymark Xpert Business Systems Inc*, 2006 ABQB 82 at para 39.
[35] (1985), 39 Alta LR (2d) 173 (QB).
[36] *Ibid* at para 13. See also *Houle v BMW Financial Services*, 2012 ABCA 333 at para 19.

39. The Lenders have adduced evidence of Delaware law through the affidavit of Christopher B. Chuff (the "**Chuff Affidavit**"), a partner at the Delaware office of law firm Troutman Pepper.[37] Attached to Mr. Chuff's affidavit is a legal memorandum prepared by Troutman Pepper examining the LUA, SSA and BCA through the lens of Delaware law.[38] As such, to the extent that Delaware law must be interpreted to decide this Application, this Court has the ability to do so.

B. The Lenders are not constrained by the LUA

i. The LUA must be read in light of the BCA and the SSA

40. As part of the Greenfire Transaction, Spicelo, along with certain other entities, but not including the Lenders, entered into a Business Combination Agreement on December 14, 2022 (the "**BCA**"). In connection with the BCA, certain parties entered into certain additional contracts, which, by virtue of Section 11.8 of the BCA, were expressly incorporated into the terms of the BCA. One such contract is the SSA, which Spicelo entered into on December 14, 2022. The purpose of the SSA was to, *inter alia*, outline certain actions that Spicelo would undertake in anticipation of the Greenfire Transaction. Amongst these required actions was the execution of the LUA pursuant to Section 1.7 of the SSA on the effective date of the Greenfire Transaction. Similar to the BCA, the SSA contains a provision that establishes that the SSA and all agreements referenced therein, including the LUA, must be construed as one agreement:

> Section 3.12. Entire Agreement. This Agreement and the agreements referenced herein constitute the entire agreement and understanding of the parties hereto in respect of the subject matter hereof and supersede all prior understandings, agreements or representations by or among the parties hereto to the extent they relate in any way to the subject matter hereof. *[Emphasis added]*

41. Under Canadian law, when dealing with interrelated agreements signed in the context of a single transaction, courts will interpret the contracts as a collective. In *Benfield Corporate Risk Canada Ltd v Beaufort International Insurance Inc*,[39] the Alberta Court of Appeal stated the following:

> 180 Even without a clause explicitly binding separate contracts into a single agreement, courts have held that where related agreements with overlapping parties are used to effect a single transaction, the contracts should be interpreted in light of each other. In *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, 2008 ONCA 396, 239 O.A.C. 137 (Ont. C.A.), Blair J.A. observed that two sets of parties, consisting of both companies and individuals, had "entered into a series of contracts in order to give effect to the 'deal'" they wished to strike:

[37] Affidavit of Christopher B. Chuff, sworn November 20, 2023 [Chuff Affidavit].
[38] *Ibid*, Appendix B.
[39] 2013 ABCA 200.

at para 33. Similarly, in this case, the APA requires the execution of the employment agreement, and the employment agreement directly refers to the APA. In *3869130 Canada Inc*, support for this view was found in John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc, 2005) at 715:

> Many transactions, especially large commercial transactions such as the purchase and sale of a large and complex business, may involve the execution of several agreements. In such contexts, it is an interesting question, then, whether in the interpretation of one of the agreements, regard may be had to the others. The basic principle is that such regard may be had only where the agreements essentially form components of one larger transaction. Where each agreement is entered into on the faith of the others being executed and where it is intended that each agreement form part of a larger composite whole, assistance in the interpretation of any particular agreement may be drawn from the related agreements.[40]

42. The same is true under Delaware law, where related documents forming part of a single transaction are to be read in conjunction with one another. In Appendix B to the Chuff Affidavit, Mr. Chuff provides the following statement of Delaware law:

> In that regard, "under Delaware law, all related documents and instruments in a single transaction together are harmonized to the extent possible." In *re Northwestern Corp.*, 313 B.R. 595, 601 (D. Del. Bankr. 2004). "[N]umerous cross-references between [] two agreements, and the fact that they are both parts of the same overall transaction, are 'sufficient nexus[es] to justify the merging of … documents." *H & S Ventures, Inc. v. RM Techtronics, LLC*, 2017 WL 237623, at *2 (Del. Super. Jan. 18, 2017). Indeed, "incorporation by reference is '[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one." *Black Diamond Hope House, Inc. v. U & I Invs., LLC*, 2018 WL 2331849, at *3 (Del. Super. May 22, 2018).[41]

43. The BCA, SSA and LUA were all entered into as part of the Greenfire Transaction. Furthermore, the LUA was entered into as a requirement under the SSA and was incorporated by reference into the BCA. The SSA expressly states that the agreements referenced therein, including the LUA, are to be construed as one agreement along with the SSA. As such, the LUA must therefore be read in light of both the BCA and the SSA and interpreted collectively and in harmony with those agreements.

---

[40] *Ibid* at para 180.
[41] Chuff Affidavit, *supra* note 37, Appendix B at 8.

ii. The Lenders are not parties to the LUA

44. The LUA is an agreement between Greenfire, M3-Brigade Sponsor III LP, Spicelo, Allard Services Limited, Annapurna Limited, Modro Holdings LLC, Robert Logan, Robert Logan Family Trust, David Phung, and David Phung Family Trust. Notably, the Lenders are not parties to the LUA and are not referenced therein. Similarly, the Lenders are not parties to either the BCA or the SSA, the agreements that provide the foundation for the LUA.

45. It is well-established in Canadian jurisprudence that, as a general rule, a contract cannot confer rights or impose obligations on any person except the parties to it.[42] This is no different in Delaware, where it is also settled law that contracts generally cannot be enforced against non-parties.[43] In Canada, certain exceptions exist, such as when one party is acting as agent for another or when there is a third-party beneficiary to a trust.[44] Aside from these traditional exceptions to privity of contract, courts have created a principled exception to privity of contract. Under the principled exception, privity may be waived in situations where the following two conditions are met: (a) the parties to the contract intended to extend the benefit in question to the third party, and (b) the activities performed by the third party are the very activities contemplated as coming within the scope of the contract.[45] This exception, however, extends only to situations in which a third party attempts to claim a benefit under a contract and does not apply to situations where parties attempt to impose obligations on a third party.[46]

46. Decisions imposing obligations on third parties are rare.[47] In some limited cases, it has been suggested that the principled exception can be expanded to impose obligations on third parties by adding a third criteria: the third party must have had knowledge of the provision and, through its conduct, assumed the agreement.[48] This formulation of the principled exception was stated in *obiter* by the Ontario Court of Appeal in *1196303 Ontario Inc v Glen Grove Suites Inc*[49] ("***Glen Grove***") and has received critical treatment by courts in other jurisdictions.[50]

47. As non-parties to the LUA, the Lenders cannot have obligations under the LUA imposed on them. Doing so would run afoul of the doctrine of privity of contract. There are no exceptions that would prevent the application of privity of contract in this situation. There is no relationship of agency or trust. Additionally, as expressly stated by the Supreme Court of Canada in cases such as *London*

---

[42] See e.g., *Greenwood Shopping Plaza Ltd v Beattie*, [1980] 2 SCR 228 at 236; *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 at 415-416 [*London Drugs*].
[43] Chuff Affidavit, *supra* note 37, Appendix B at 7.
[44] *London Drugs*, *supra* note 42 at 416-417.
[45] *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108 at para 32.
[46] *Ibid* at paras 28-29, 32.
[47] *1196303 Ontario Inc v Glen Grove Suites Inc*, 2015 ONCA 580 at para 98.
[48] *Ibid* at para 103, citing *Seip & Associates Inc v Emmanuel Village Management Inc*, 2009 ONCA 222.
[49] 2015 ONCA 580.
[50] See e.g., *Ocean Choice International Limited Partnership v Landvis Canada Inc*, 2016 NLCA 36 at paras 35-38.

Drugs Ltd v Kuehne & Nagel International Ltd[51] and *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*,[52] the principled exception is only to apply in situations where a right is being conferred on a third party, not in situations where an obligation is sought to be imposed.[53] The statement in *Glen Grove* expanding the principled exception to include such situations is *obiter* and is not binding in Alberta. Even supposing that the *Glen Grove* test is applicable, the third part of the test cannot be established in this case. The Lenders had no prior knowledge of the LUA and in no way can be said to have assumed the agreement.

48. Further, far from any intention to assume any obligations under the LUA, the very entrance into the LUA by Spicelo was clearly prohibited by the Lenders under the Share Pledge created pursuant to the Loan Agreement. Pursuant to Section 37(h) of the Share Pledge, Spicelo covenanted not to "create or suffer to exist, any Lien on the Collateral, as applicable, and will not grant control over the Collateral to any Person other than the Collateral Agent." A "Lien" as defined in the Share Pledge (by reference to the defined terms in the Loan Agreement) includes any encumbrance, such as a prohibition on transfer of the like created by the LUA.As such, the Lenders cannot be bound by the terms of the LUA and are therefore not prevented from seeking the appointment of a receiver over the Pledged Shares.

iii. The Share Pledge is expressly exempt from the LUA under the terms of the SSA

49. Although the LUA does not bind the Lenders, even assuming that it did, the Share Pledge is expressly exempted from the "prohibitions, covenants and other provisions" of the SSA at Section 1.2:

> Set forth on Exhibit II attached hereto and made a part hereof is a list of existing liens to which certain Subject Shares are subject, copies of which liens have been provided to the parties hereto ("Existing Liens"). Notwithstanding any other provision hereof, it is expressly acknowledged and agreed (i) that such Existing Liens, and any liens hereafter created in replacement thereof which are not materially more restrictive with respect to the voting ability of the Supporting Company Shareholder than the Existing Liens ("Replacement Liens"), the provisions of the instruments creating such Existing Liens and Replacement Liens, and actions taken by Supporting Company Shareholders and secured parties thereto in accordance with the provisions of such instruments, shall serve as exceptions to each of the prohibitions, covenants and other provisions contained herein, and (ii) that Replacement Liens are expressly permitted. *[Emphasis added]*

[51] [1992] 3 SCR 299.
[52] [1999] 3 SCR 108.
[53] *Ibid* at para 32; *London Drugs*, *supra* note 42 at 448-449.

50. The Share Pledge is listed as one of the "Existing Liens" at Exhibit II to the SSA. The LUA was entered into by Spicelo pursuant to the SSA and subject to the express exclusion of the Lenders' realization on their security pursuant to the Share Pledge as an "Existing Lien". As such, it was clearly not the intention of Spicelo or the counterparties to the SSA or LUA to have the LUA apply to the Pledged Shares.

51. This is further evidenced by the anti-consistency provision in the SSA that prohibits Spicelo from entering into any agreement that is inconsistent with the provisions of the SSA, including the "Existing Liens" provision at Section 1.2. That section reads as follows:

> Section 1.10. No Inconsistent Agreement. Each Supporting Company Shareholder hereby represents and covenants that such Supporting Company Shareholder… shall not enter into, any agreement that would restrict, limit or interfere with the performance of such Supporting Company Shareholder's obligations hereunder.

52. Additionally, if the LUA were interpreted to apply to the Pledged Shares, this would mean that Spicelo entered into the LUA in direct violation of the Share Pledge. As noted above, in the Share Pledge, Spicelo covenanted to, *inter alia*, "not create or suffer to exist, any Lien on the Collateral…". A Lien is as defined in the Loan Agreement and includes, *inter alia*, any encumbrance, such as an inability to transfer the Pledged Shares pursuant to the LUA. It could not have been Spicelo's intention that by executing the LUA, it would immediately be placing itself in breach of the Share Pledge, especially given the specific carve-out given to the Share Pledge in the earlier-executed SSA.

53. By virtue of Section 1.2 of the SSA, the Lenders are expressly permitted to realize on the Share Pledge and sell the Pledged Shares regardless of any other provisions of the SSA or LUA.

54. This interpretation is supported under Delaware law where, similarly, agreements pertaining to the same transaction must be viewed in harmony with each other. In Appendix B to the Chuff Affidavit, Mr. Chuff provides the following interpretation:

> As such, the transfer restrictions in the Lock-Up Agreement would be subject to the overarching Existing Lien Exception in Section 1.3 of the Shareholder Agreement, which states that "[n]otwithstanding any other provision hereof, it is expressly acknowledged and agreed … that such Existing Liens, and any … Replacement Liens, and actions taken by Supporting Company Shareholders and secured parties thereto in accordance with the provisions of such instruments, *shall serve as the exceptions to each of the prohibitions, covenants and other provisions contained herein*."

> As a consequence, even if the Lenders were subject to the Lock-Up Agreement (they are not), the Existing Lien Exception would nevertheless permit the Lenders to take action in accordance with the Spicelo Guarantee, including the Share Pledge, without contravening the transfer restriction in the Lock-Up Agreement.[54]

C. In the alternative, the Lenders meet the exceptions under the LUA

55. The LUA provides certain exemptions to its application, including, *inter alia*, the following:

> 2. Lock-Up Provisions. … (b) Notwithstanding the provisions set forth in Section 2(a), each Holder or its respective Permitted Transferees may Transfer the Lock-Up Securities during the Lock-Up Period… (vii) in connection with a pledge of PubCo Common Shares, or any other securities convertible into or exercisable or exchangeable for PubCo Common Shares, to a financial institution, including the enforcement of any such pledge by a financial institution… or (xii) in connection with any legal, regulatory or other order…

i. Exception for enforcement of pledge by financial institution

56. The term "financial institution" is not defined in the LUA, SSA, or BCA. In Black's Law Dictionary, "financial institution" is defined as "(a) business, organization, or other entity that manages money, credit, or capital, such as a bank, credit union, savings-and-loan association, securities broker or dealer, pawnbroker, or investment company."[55]

57. Had the parties wished to enact a narrower definition of the phrase "financial institution", they could have done so by expressly defining it. However, they chose not to, and therefore the ordinary and plain meaning of the term applies. The Lenders are clearly financial institutions pursuant to the term's ordinary and plain meaning. Both Trafigura and Signal are entities that manage and provide money, credit, or capital within the oil and gas industry in Western Canada and elsewhere. Signal is predominantly engaged in activities which include managing a private credit and investment management platform, providing financing solutions across a broad range of asset classes, including corporate loans and bonds, natural resources, transportation assets, and real estate. The Lenders are therefore entitled to rely on the Section 2(a)(vii) exception to realize on the Share Pledge and sell the Pledged Shares.

---

[54] Chuff Affidavit, *supra* note 37, Appendix B at 14.
[55] Bryan A Garner, ed, ***Black's Law Dictionary***, 11th ed (St Paul: Thomson Reuters, 2019) sub verbo "financial institution".

ii. Exception for court order

58. Similarly, the terms “legal”, “regulatory” and “order” are not defined in the LUA, SSA, or BCA. In Black’s Law Dictionary, “order” is defined as “(a) written direction or command delivered by a government official, especially a court or judge”, “legal” is defined as “(o)f, relating to, or involving law generally”, and “regulation” is defined as “(a)n official rule or order, having legal force, usually issued by an administrative agency.”[56] Based on a plain and ordinary reading of this provision, the phrase “in connection with any legal, regulatory, or other order” should properly be interpreted as in connection with any direction or command issued by a court.

59. As such, this Court has the discretion pursuant to Section 2(a)(xii), notwithstanding any prohibition in the LUA, to order that any lock-up provisions do not apply in certain circumstances, including to ensure that there are no impediments to the Lenders’ exercising their contractual right to enforce the Share Pledge and to have a receiver appointed in respect of the Pledged Shares.

60. This interpretation also accords with Delaware law where courts will “look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract.”[57]

V. CONCLUSION

61. The Lenders are in no way bound by the lock-up provisions contained in the LUA. The Lenders are not parties to the LUA, the Share Pledge is expressly exempt from the terms of the LUA, the lock-up imposed by the LUA is in breach of the Share Pledge, and the Lenders are captured by the exceptions written into the LUA. This conclusion is the same under both Alberta and Delaware law, as evidenced by the conclusions drawn by Troutman Pepper:

> Neither the Shareholder Agreement nor the Lock-Up Agreement, including the transfer restrictions contained in those agreements, prevent the Lenders from exercising their contractual rights with respect to the Greenfire Shares. This conclusion is reached by applying Delaware law contract interpretation principles.[58]
>
> (…)
>
> Here, under these principles and as explained in greater detail below, the Shareholder Agreement and Lock-Up Agreement do not prevent the Lenders from exercising their

[56] *Ibid* sub verbo “order”, “legal”, and “regulation”.
[57] Chuff Affidavit, *supra* note 37, Appendix B at 7, 9.
[58] *Ibid* at 7.

contractual rights with respect to the Greenfire Shares because: (a) the Shareholder Agreement and Lock-Up Agreement cannot bind the Lenders because they are not parties to those agreements; (b) the Shareholder Agreement's transfer restrictions expired when the Business Combination closed on September 20, 2023 and are therefore of no further force or effect; and (c) several exceptions to the transfer restrictions in the Lock-Up Agreement apply to the Lenders' enforcement of the Spicelo Guarantee, including the Order Exception, the Pledge Enforcement Exception, and the Lien Exception.[59]

62. For the foregoing reasons, the Lenders respectfully submit that this Court should grant the form of Order appended as **Schedule "A"** to the Notice of Application dated November 20, 2023.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20 DAY OF NOVEMBER 2023

STIKEMAN ELLIOTT LLP

By: _____
Karen Fellowes, K.C.
Lawyer for the Applicants,
Trafigura Canada Limited and Signal Alpha C4 Limited

[59] *Ibid* at 9.

TABLE OF AUTHORITIES

TAB	DOCUMENT
1	*Deadman v Jager Estate*, 2019 ABCA 481.
2	*Club Resorts Ltd v Van Breda*, 2012 SCC 17.
3	*1297835 Alberta Ltd v Xtreme Coil Drilling Corp*, 2010 ABQB 539.
4	*Han v Cho*, 2006 BCSC 1623.
5	*K-Lath v Gemini Structural Systems Inc*, 1997 ABCA 256.
6	*Dyck v Questrade Inc*, 2012 ABCA 187.
7	*Volkswagen Canada Inc v Auto Haus Frohlich Ltd*, 1985 ABCA 223.
8	*Swimwear Etc v Raymark Xpert Business Systems Inc*, 2006 ABQB 82.
9	*Royal Bank v Neher* (1985), 39 Alta LR (2d) 173 (QB).
10	*Houle v BMW Financial Services*, 2012 ABCA 333.
11	*Benfield Corporate Risk Canada Ltd v Beaufort International Insurance Inc*, 2013 ABCA 200.
12	*Greenwood Shopping Plaza Ltd v Beattie*, [1980] 2 SCR 228.
13	*London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299.
14	*Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108.
15	*1196303 Ontario Inc v Glen Grove Suites Inc*, 2015 ONCA 580.
16	*Ocean Choice International Limited Partnership v Landvis Canada Inc*, 2016 NLCA 36.

Tab 1

In the Court of Appeal of Alberta

Citation: Deadman v Jager Estate, 2019 ABCA 481

Date: 20191210
Docket: 1903-0001-AC
Registry: Edmonton

Between:

The Estate of John Jager, by its Litigation Representative, Theodore Jager, and Marion Jager, by her Litigation Representative, Cindy Arcand

Respondents
(Plaintiffs)

- and -

Thomas Deadman and Constance Deadman

Appellants
(Defendants)

The Court:

The Honourable Madam Justice Sheila Greckol
The Honourable Madam Justice Jo'Anne Strekaf
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment

Appeal from the Order of
The Honourable Mr. Justice J.T. Neilson
Dated the 3rd day of December, 2018
Filed the 16th day of January, 2019
(2018 ABQB 985, Docket: 1703 21226)

error arises from the statement of the legal test: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at paras 8, 10, 23, 28, 33 and 36.

[10] The characterization of the tests for jurisdiction *simpliciter* and *forum non conveniens* are questions of law. The factual findings and determination of whether jurisdiction *simpliciter* exists are questions of mixed fact and law, for which deference will be afforded, absent an error.

[11] Whether *forum non conveniens* applies is a discretionary decision and is afforded deference on appeal.

Analysis

[12] The Deadmans challenge the jurisdiction of the Alberta courts to hear the claims brought against them, and their arguments on the appeal engage the application of conflicts rules of Canadian private international law. As the Supreme Court stated in *Club Resorts Ltd v Van Breda*, 2012 SCC 17, and reiterated in *Haaretz.com v Goldhar*, 2018 SCC 28 at para 27, central to a proper understanding of those rules is "an appreciation of the distinct roles played by jurisdiction *simpliciter* and *forum non conveniens*". The analysis of jurisdiction *simpliciter* establishes a minimum threshold to determine whether a court *has* jurisdiction, on the basis that a "real and substantial connection" exists between the chosen forum and the subject matter of the litigation. The *forum non conveniens* analysis addresses whether a court with jurisdiction *simpliciter* should nevertheless decline to exercise that jurisdiction in favour of a "clearly more appropriate forum".

[13] The test for jurisdiction *simpliciter* is intended to establish a minimum threshold for the assumption of jurisdiction. When an application to challenge jurisdiction is brought, the onus is on the plaintiff to establish jurisdiction *simpliciter* by demonstrating the presence of presumptive connecting factors, which establish a real and substantial connection between the facts on which the claim is based and the chosen forum, entitling the court to assume jurisdiction over the dispute. The defendant can rebut the presumed jurisdiction by establishing facts which demonstrate that the presumptive connecting factors do not point to any real relationship, or only a weak relationship, between the subject matter of the litigation and the forum. If the defendant fails to do so, jurisdiction *simpliciter* is established.

[14] Jurisdiction *simpliciter* establishes only that the court has jurisdiction, not that it should exercise it. The *forum non conveniens* analysis permits a defendant to show why the court should decline to exercise its jurisdiction in favour of another forum that also has a real and substantive connection under conflicts rules, but which is a more appropriate forum to dispose of the action.

[15] The appellants submit that the chambers judge erred by:

a) failing to consider or properly apply the legal test for creating additional presumptive real and substantial connecting factors for the purpose of establishing the court's jurisdiction *simpliciter*;

b) incorrectly assuming jurisdiction over all of the claims based on some of the claims having presumptive jurisdiction;

c) incorrectly applying the legal test for whether presumptive jurisdiction has been rebutted; and

d) improperly applying the *forum non conveniens* analysis.

[16] The first three arguments all deal with whether Alberta has jurisidiction *simpliciter* over the claim. The fourth, *forum non conveniens*, arises only if jurisdiction is found.

Jurisdiction *Simpliciter*: Presumptive connecting factors

[17] In *Van Breda*, the Supreme Court described a non-exhaustive list of presumptive connecting factors, the existence of which allow a court to presume that the claim is properly before it under conflicts rules, absent indications to the contrary: para 80. These are objective factors that connect the subject matter of the litigation with the forum. For example, in a tort claim, a court would be entitled to assume jurisdiction over a dispute where:

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

b) the defendant carries on business in the province;

c) the tort was committed in the province; and

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

[18] As noted above, the list is not exhaustive. In identifying new presumptive factors, a court should look to connections that "give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors": *Van Breda* at para 91. The court in *Van Breda* found it useful to have regard to factors drawn from the Ontario rules of civil procedure that relate to situations in which service *ex juris* is allowed: see para 83. As the court noted, although these factors relate to *service ex juris* and were not adopted as conflicts rules, they "represent an expression of wisdom and experience drawn from the life of the law", many "are based on objective facts that may also indicate when courts can properly assume jurisdiction", and they can offer guidance for the development of this area of private international law.

[19] Similarly, the Alberta *Rules of Court* provide that document commencing an Alberta action may be served outside Alberta where "a real and substantial connection exists between Alberta and the facts on which a claim in the action is based": Rule 11.25(1). We agree with the chambers judge that some of the circumstances specified in Rule 11.25(3) are helpful in defining relevant presumptive factors in this case, although we do not agree with all of his conclusions in that regard.

[20] The chambers judge found that the following circumstances, which are described in rule 11.25(3) and which allow for service *ex juris*, are relevant to the claim brought against the Deadmans:

a) Rule 11.25(3)(b): a claim which "relates to a contract or alleged contract made, performed or breached in Alberta". The chambers judge noted that the first promissory note was signed in Alberta and the funds were advanced from the Jagers' bank account in Alberta. The second promissory note was signed in Mexico, but the funds were advanced from the Jagers' bank account in Alberta. Some payments were made to the Jagers' Alberta bank account, so the contracts were at least partially performed in Alberta.

b) Rule 11.25(3)(c): a claim which is "governed by the law of Alberta". The promissory notes state that they are governed by Alberta law, and the claim alleges that it was an express or implied term of the loan related to the Condo Investment that it was governed by Alberta law.

c) Rule 11.25(3)(d): claims relating to "a tort committed in Alberta". The claim alleges misrepresentations made during meetings in Alberta in April 2014 and damages sustained in Alberta.

d) Rule 11.25(3)(h) refers to claims relating "to the administration of an estate and the deceased died while ordinarily resident in Alberta". John Jager died while ordinarily resident in Alberta and the litigation seeks to enforce claims on behalf of his estate.

[21] We agree with the Deadmans that the last of these stated connecting factors, that the claim relates to the administration of an estate, has no applicability here. The chambers judge appears to have concluded that claims advanced by an executor in Alberta on behalf of a deceased Alberta resident constitutes a presumptive factor. As the Deadmans note, this was not previously recognized as a presumptive factor; recognizing it as such would effectively conclude that the mere presence of a plaintiff in a jurisdiction gives rise to a presumptive factor, a conclusion that was rejected in *Van Breda*. To the extent Rule 11.25(3)(h) would indicate a presumptive factor, it would be limited to estate matters and would not apply to all claims brought on behalf of an estate against out-of-province defendants.

[22] The Deadmans concede that the Alberta court has presumptive jurisdiction over the Promissory Notes Claim, given that the promissory notes state on their face that they are to be governed by the law of Alberta and the contracts were partially performed in Alberta. We agree that the Alberta court clearly has jurisdiction over claims related to the promissory notes.

Jurisdiction over entire claim

[23] Notwithstanding the jurisdiction of the Alberta court over the parts of the claim dealing with the promissory notes, the Deadmans argue that the court lacks jurisdiction over the balance of the claims raised in the pleadings which, they say, arise out of the Condo Investment and the Mexican litigation involving that failed investment. They say that the Promissory Notes Claim should be considered separately from the parts of the claim related to the Condo Investment; they

Tab 2

Club Resorts Ltd. *Appellant*

v.

Morgan Van Breda, Viktor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda and Tonnille Van Breda *Respondents*

and

Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association *Interveners*

- and -

Club Resorts Ltd. *Appellant*

v.

Anna Charron, Estate Trustee of the Estate of Claude Charron, deceased, the said Anna Charron, personally, Jennifer Candace Charron, Stephanie Michelle Charron, Christopher Michael Charron, Bel Air Travel Group Ltd. and Hola Sun Holidays Limited *Respondents*

and

Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association *Interveners*

Indexed as: Club Resorts Ltd. *v.* Van Breda

2012 SCC 17

File Nos.: 33692, 33606.

2011: March 21; 2012: April 18.

Club Resorts Ltd. *Appelante*

c.

Morgan Van Breda, Viktor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda et Tonnille Van Breda *Intimés*

et

Tourism Industry Association of Ontario, Amnistie internationale, Centre canadien pour la justice internationale, Juristes canadiens pour les droits de la personne dans le monde et Ontario Trial Lawyers Association *Intervenants*

- et -

Club Resorts Ltd. *Appelante*

c.

Anna Charron, fiduciaire de la succession de Claude Charron, décédé, la dite Anna Charron, personnellement, Jennifer Candace Charron, Stephanie Michelle Charron, Christopher Michael Charron, Bel Air Travel Group Ltd. et Hola Sun Holidays Limited *Intimés*

et

Tourism Industry Association of Ontario, Amnistie internationale, Centre canadien pour la justice internationale, Juristes canadiens pour les droits de la personne dans le monde et Ontario Trial Lawyers Association *Intervenants*

Répertorié : Club Resorts Ltd. *c.* Van Breda

2012 CSC 17

N^{os} du greffe : 33692, 33606.

2011 : 21 mars; 2012 : 18 avril.

Tolofson. The difficulty lies in locating the *situs*, not in acknowledging the validity of this factor once the *situs* has been identified. Claims related to contracts made in Ontario would also be properly brought in the Ontario courts (rule 17.02(f)(i)).

[89] The use of damage sustained as a connecting factor may raise difficult issues. For torts like defamation, sustaining damage completes the commission of the tort and often tends to locate the tort in the jurisdiction where the damage is sustained. In other cases, the situation is less clear. The problem with accepting unreservedly that if damage is sustained at a particular place, the claim presumptively falls within the jurisdiction of the courts of the place, is that this risks sweeping into that jurisdiction claims that have only a limited relationship with the forum. An injury may happen in one place, but the pain and inconvenience resulting from it might be felt in another country and later in a third one. As a result, presumptive effect cannot be accorded to this connecting factor.

[90] To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

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

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

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

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

(b) *Identifying New Presumptive Connecting Factors*

[91] As I mentioned above, the list of presumptive connecting factors is not closed. Over time, courts may identify new factors which also presumptively

rattachement approprié. La difficulté consiste souvent à situer ce lieu, et non à reconnaître la validité de ce facteur une fois que le lieu a été établi. Les recours liés à des contrats conclus en Ontario pourraient également être à bon droit intentés en Ontario (sous-al. 17.02f)(i)).

[89] Le recours au préjudice en tant que facteur de rattachement peut soulever des problèmes difficiles. Dans le cas des délits comme la diffamation, la perpétration du délit est complète lorsqu'il cause un préjudice, et l'on tend souvent à situer le délit dans le ressort où le préjudice se manifeste. Dans d'autres cas, la situation est moins claire. Si l'on admet sans réserve que la manifestation du préjudice à un endroit fera présumer que le recours relève de la compétence des tribunaux de cet endroit, on risque d'assujettir à la compétence de ces tribunaux des recours n'ayant qu'un faible lien avec eux. Une personne peut être blessée dans un lieu, mais la douleur et les inconvénients en résultant peuvent bien se faire sentir dans un autre pays et, plus tard, dans un troisième pays. Par conséquent, on ne saurait attribuer l'effet d'une présomption à ce facteur de rattachement.

[90] Pour récapituler, dans une instance relative à un délit, les facteurs suivants constituent des facteurs de rattachement créant une présomption qui, à première vue, autorisent une cour à se déclarer compétente à l'égard du litige :

a) le défendeur a son domicile dans la province ou y réside;

b) le défendeur exploite une entreprise dans la province;

c) le délit a été commis dans la province;

d) un contrat lié au litige a été conclu dans la province.

b) *Reconnaître de nouveaux facteurs de rattachement créant une présomption*

[91] Comme je l'ai indiqué, la liste des facteurs de rattachement créant une présomption n'est pas exhaustive. Au fil du temps, les tribunaux pourront

entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:

(a) Similarity of the connecting factor with the recognized presumptive connecting factors;

(b) Treatment of the connecting factor in the case law;

(c) Treatment of the connecting factor in statute law; and

(d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

[92] When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.

[93] If, however, no recognized presumptive connecting factor — whether listed or new — applies, the effect of the common law real and substantial

reconnaître de nouveaux facteurs créant eux aussi une présomption de compétence des tribunaux. Ce faisant, les tribunaux devraient envisager des liens qui révèlent avec le tribunal un rapport de nature semblable à ceux qui découlent des facteurs qui figurent sur la liste. Les considérations suivantes pourraient s'avérer pertinentes :

a) la similitude du facteur de rattachement avec les facteurs de rattachement reconnus créant une présomption;

b) le traitement du facteur de rattachement dans la jurisprudence;

c) le traitement du facteur de rattachement dans la législation;

d) le traitement du facteur de rattachement dans le droit international privé d'autres systèmes juridiques qui ont en commun avec le Canada les valeurs d'ordre, d'équité et de courtoisie.

[92] Le tribunal qui envisage la possibilité de conférer à un nouveau facteur de rattachement l'effet d'une présomption peut mettre à profit les outils utiles que constituent les valeurs d'ordre, d'équité et de courtoisie dans l'analyse de la solidité du rapport avec le tribunal révélé par ce facteur. Tous les facteurs de rattachement créant une présomption, qu'ils soient énumérés ou nouveaux, reposent sur ces valeurs. Ils révèlent généralement, entre l'objet du litige et le tribunal, un rapport tel qu'il serait raisonnable de s'attendre à ce que le défendeur soit appelé à se défendre dans une action devant ce tribunal. En règle générale, en présence d'un tel rapport, on s'attendrait à ce que les tribunaux canadiens reconnaissent et exécutent les jugements étrangers en se fondant sur ce facteur de rattachement créant une présomption, et à ce que les tribunaux étrangers fassent de même à l'égard des décisions canadiennes. La déclaration de compétence semblerait ainsi conforme aux principes de courtoisie, d'ordre et d'équité.

[93] Toutefois, si aucun facteur de rattachement créant une présomption — énuméré ou nouveau — ne s'applique, le critère de common law du lien réel

connection test is that the court should not assume jurisdiction. In particular, a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system.

et substantiel devrait empêcher le tribunal de se déclarer compétent. Tout particulièrement, le tribunal devrait refuser de se déclarer compétent en se fondant sur l'effet combiné de plusieurs facteurs de rattachement ne créant pas de présomption. Il évitera ainsi d'ouvrir la voie à des déclarations de compétence reposant en grande partie sur l'exercice au cas par cas du pouvoir discrétionnaire, ce qui contredirait les objectifs d'ordre, de certitude et de prévisibilité qui se situent au cœur d'un système de droit international privé équitable et fondé sur des principes.

[94] Where, on the other hand, a recognized presumptive connecting factor does apply, the court should assume that it is properly seized of the subject matter of the litigation and that the defendant has been properly brought before it. In such circumstances, the court need not exercise its discretion in order to assume jurisdiction. It will have jurisdiction unless the party challenging the assumption of jurisdiction rebuts the presumption resulting from the connecting factor. I will now turn to this issue.

[94] Par contre, si un facteur de rattachement reconnu créant une présomption s'applique, la cour doit supposer qu'elle est saisie à juste titre de l'objet du litige et que le défendeur a valablement été interpellé devant cette cour. Dans de telles circonstances, la cour n'a pas à exercer son pouvoir discrétionnaire pour se déclarer compétente. Elle aura compétence à moins que la partie qui s'oppose à la déclaration de compétence réfute la présomption découlant du facteur de rattachement. C'est cette question que j'aborde maintenant.

(c) *Rebutting the Presumption of Jurisdiction*

c) *Réfutation de la présomption de compétence*

[95] The presumption of jurisdiction that arises where a recognized connecting factor — whether listed or new — applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

[95] La présomption de compétence créée lorsqu'un facteur de rattachement reconnu — énuméré ou nouveau — s'applique n'est pas irréfutable. Le fardeau de la réfuter incombe bien entendu à la partie qui s'oppose à la déclaration de compétence. Cette dernière doit établir les faits démontrant que le facteur de rattachement créant une présomption ne révèle aucun rapport réel — ou ne révèle qu'un rapport ténu — entre l'objet du litige et le tribunal.

[96] Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. For instance, where the presumptive connecting factor is a contract made in the province, the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the

[96] Des exemples tirés de la liste des facteurs de rattachement créant une présomption applicables en matière délictuelle permettent d'illustrer la façon de réfuter cette présomption. Ainsi, lorsque le facteur de rattachement créant une présomption prend la forme d'un contrat conclu dans la province, une partie peut réfuter cette présomption en démontrant que le contrat a peu ou rien à voir

on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court can stay proceedings brought before it on the basis of the doctrine.

[105] A party applying for a stay on the basis of *forum non conveniens* may raise diverse facts, considerations and concerns. Despite some legislative attempts to draw up exhaustive lists, I doubt that it will ever be possible to do so. In essence, the doctrine focusses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient. For example, s. 11(1) of the *CJPTA* provides that a court may decline to exercise its jurisdiction if, "[a]fter considering the interests of the parties to a proceeding and the ends of justice", it finds that a court of another state is a more appropriate forum to hear the case. Section 11(2) then provides that the court must consider the "circumstances relevant to the proceeding". To illustrate those circumstances, it contains a non-exhaustive list of factors:

(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. [s. 11(2)]

[106] British Columbia's *Court Jurisdiction and Proceedings Transfer Act*, which is based on the *CJPTA*, contains an identical provision — s. 11 — on

déclaration de compétence. Cette doctrine reconnaît que les tribunaux de common law conservent le pouvoir résiduel de ne pas exercer leur compétence dans des circonstances appropriées, quoique limitées, afin d'assurer l'équité envers les parties et le règlement efficace du litige. Les tribunaux peuvent, sur la base de cette doctrine, suspendre les procédures engagées devant eux.

[105] Une partie qui sollicite une suspension d'instance pour cause de *forum non conveniens* peut invoquer des faits, considérations et préoccupations divers. Je doute que l'on puisse un jour en dresser une liste exhaustive malgré les quelques tentatives en ce sens du législateur. La doctrine est axée essentiellement sur le contexte de chaque affaire, et elle vise à assurer l'équité envers les deux parties et l'efficacité de la démarche menant au règlement du litige. Par exemple, le par. 11(1) de la *LUCTRI* prévoit qu'« [a]près avoir pris en considération l'intérêt des parties à une instance et les fins de la justice », le tribunal peut refuser d'exercer sa compétence si, à son avis, il conviendrait mieux que l'instance soit instruite par un tribunal d'un autre État. Le paragraphe 11(2) prévoit ensuite que le tribunal doit prendre en considération les « circonstances pertinentes [à l'instance] ». Il dresse une liste non exhaustive de facteurs comme exemples de telles circonstances :

a) dans quel ressort il serait plus commode et moins coûteux pour les parties à l'instance et leurs témoins d'être entendus;

b) la loi à appliquer aux questions en litige;

c) le fait qu'il est préférable d'éviter la multiplicité des instances judiciaires;

d) le fait qu'il est préférable d'éviter que des décisions contradictoires soient rendues par différents tribunaux;

e) l'exécution d'un jugement éventuel;

f) le fonctionnement juste et efficace du système judiciaire canadien dans son ensemble. [par. 11(2)]

[106] La *Court Jurisdiction and Proceedings Transfer Act* de la Colombie-Britannique, inspirée de la *LUCTRI*, prévoit à son art. 11 une disposition

Tab 3

Court of Queen's Bench of Alberta

Citation: 1297835 Alberta Ltd. v. Xtreme Coil Drilling Corp., 2010 ABQB 539

Date: 20100823
Docket: 0903 00722
Registry: Edmonton

Between:

1297835 Alberta Ltd. carrying on business as Mayco Industries Group

Plaintiff/Defendant by Counterclaim
(Applicant)

- and -

Xtreme Coil Drilling Corp.

Defendant/Plaintiff by Counterclaim
(Respondent)

Memorandum of Decision
of the
Honourable Madam Justice J.M. Ross

---

[1] The Plaintiff/Defendant by Counterclaim ("Mayco") supplied electrical control systems to the Defendant/Plaintiff by Counterclaim ("Xtreme") for use on 14 drill rigs. These systems were installed on drill rigs in various locations, including in Colorado, Mexico and Texas. The drilling operations in these locations are conducted by subsidiary corporations of Xtreme Alberta, including Xtreme Coil Drilling Corporation incorporated in Texas (Xtreme Texas), which operated a drilling operation in Colorado.

[2] Xtreme alleges that, soon after delivery of the Mayco control systems, difficulties arose on drill rigs in which the systems had been installed. On May 4, 2008, an incident occurred on a drilling project operated by Xtreme Texas in Colorado. A piece of equipment (a top drive) being lowered to the well bore accelerated rapidly, and could not be controlled. The top drive hit the

[27] Xtreme argues that the facts show only a failure to pay, and that failure to pay alone does not mean that a party lacks "clean hands". The Saskatchewan Court of Appeal rejected this notion in ***Saskatchewan Wheat Pool v. Feduk***, at para. 62:

> To the extent that the trial judge relied upon "the inducement" of Mr. Feduk to deliver product that was not paid for, she also erred in law. This factor cannot be used to point to the Wheat Pool's lack of clean hands, as these actions relate to the set-off itself. We agree with the Wheat Pool's counsel that to conclude otherwise would be circular: a party would not be entitled to set-off because it had, in fact, exercised its entitlement to set-off.

[28] As to Mayco's assertion that Xtreme never intended to pay for the parts and services, Xtreme argues that this is a bare assertion. There is no evidence that Xtreme had no intention of paying when it ordered the parts and services. Mayco could have put this to Xtreme when its officer was cross-examined but did not do so, and the assertion should therefore be given no weight.

[29] I agree with Xtreme that there is no evidence that it comes to the court without "clean hands". I disagree with Mayco that the onus is on Xtreme, at this time, to demonstrate this and establish its entitlement to equitable set-off. The question of clean hands and Xtreme's ultimate entitlement to the remedy remain issues for trial. In this application, it is Mayco that seeks to sever the counterclaim and obtain summary judgment on the main claim. It is Mayco, therefore, that has the onus of establishing that the defence of equitable set-off plainly cannot succeed. Mayco has not met that onus.

(2) Jurisdiction and Forum Conveniens

[30] Mayco's application for a stay on grounds of jurisdiction and *forum conveniens* cannot succeed. Having elected to bring its claim in Alberta, Mayco has attorned to the jurisdiction of this Court: ***Deloitte & Touche LLP v. Shaw***, 2006 ABQB 322, at para. 3. Mayco must answer to the consequences of bringing its claim in this jurisdiction, including the consequence of answering to a counterclaim that must be conjoined and pleaded with the defence: ***Deloitte & Touche LLP v. Shaw***, at para. 3, citing ***K-Lath, a Division of Georgetown Wire Company, Inc. v. Gemini Structural systems Inc.***, [1997] A.J. No. 736, at para. 12.

[31] As to *forum conveniens*, nothing in the facts suggests that there is another forum more appropriate to the pursuit of the counterclaim: ***Deloitte & Touche LLP v. Shaw***, at para. 6. The contracts for supply of control systems were made in Alberta. The control systems were delivered to Xtreme in Alberta. There is nothing that suggests that a court in Colorado could or would take jurisdiction with regard to Xtreme's claims based on these contracts. As noted above, Xtreme is not a party to the ongoing Colorado action, and the action is not based on the contracts between Xtreme and Mayco.

Tab 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Han et al. v. Cho et al.***
2006 BCSC 1623

Date: 20061110
Docket: L050150
Registry: Vancouver

Between:

Chul-Soo Han and Suk Hee Park

Plaintiffs

And:

Soonam Cho, Subi Park, Jioh Park, and Young Chan Shim

Defendants

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for Plaintiffs	F.G. Potts J. Gopaulsingh
Counsel for Defendant Soonam Cho	G.A. Phillips
Counsel for Defendants Subi Park, Jioh Park and Young Chan Shim	W.D. Holder
Date and Place of Hearing:	October 12, 2006 Vancouver, B.C.

[59] Even had I not refused to decline jurisdiction, I would have found that once I joined the Plaintiff Yun, the attornment by the defendant is for the purpose of the action as a whole. I have been unable to locate any authority directly on point. However, by analogy to plaintiffs who implicitly consent to the exercise of the court's jurisdiction in relation to counterclaims brought against them, it appears to me that the Defendant, having submitted to the jurisdiction of this Court, submits to having this entire proceeding determined by this Court. As Southin J.A. stated in ***Kung v. Kung*** (1990), 42 B.C.L.R. (2d) 145 at 150, 19 A.C.W.S. (3d) 41 (C.A.):

> As to the substantial point of forum conveniens, I simply say that, in my opinion, Mr. Shapray is right. Having invoked the jurisdiction of this Court, the respondent must live with the consequences and one of those consequences is the raising of this defence. Another is that he submits himself to liability to a counterclaim which, in this case, is founded essentially upon the allegations pleaded in defence: see *Republic of Liberia et al. v. Gulf Oceanic Inc. et al.,* [1985] 1 Lloyd's Rep. 539 (C.A.).

[60] See also ***K-Lath, a Division of Georgetown Wire Company, Inc. v. Gemini Structural Systems Inc***. (1997), 200 A.R. 285, 72 A.C.W.S. (3d) 838 at para. 12 (C.A.). This is not a case like ***JLA Associates v. Kenny*** (2003), 41 C.P.C. (5th) 151, 2003 BCSC 1670, in which Davies J. considered whether the court had jurisdiction over a third-party claim against the principals of the corporate plaintiff independently of the submission to the court's jurisdiction by the corporate plaintiff itself. In that case, the principals of the corporate plaintiff were separate juristic entities from the corporate plaintiff, and Davies J. separately considered whether *jurisdiction simpliciter* and *forum conveniens* were established in respect of the

Tab 5

In the Court of Appeal of Alberta

Citation: K-Lath Division v. Gemini Structural Systems Inc., 1997 ABCA 256

Date: 19970710
Docket: 95-16222
Registry: Calgary

Between:

K-Lath Division of Georgetown Wire Company, Inc.

Appellant
(Plaintiff and
Defendant by
Counterclaim)

- and -

Gemini Structural Systems Inc.
and Herb K. Schilger

Respondents
(Defendants and
Plaintiffs by
Counterclaim)

The Court:

The Honourable Mr. Justice Bracco
The Honourable Madam Justice Conrad
The Honourable Mr. Justice Clark

Memorandum of Judgment

COUNSEL:

R.D. Maxwell, for the Appellant (Plaintiff and Defendant by Counterclaim)

Respondent H.K. Schilger appeared for the company and on his own behalf

---

MEMORANDUM OF JUDGMENT

THE COURT:

[1] The issues in this appeal are whether the learned Chambers Judge erred in: (i) concluding that the onus of proving forum conveniens fell upon the defendant; and (ii) concluding that the defendant failed to discharge this burden by proving that either

> [T]hat either Alberta or California, and perhaps even Mexico, would be forum conveniens for the litigation, and California is not clearly or distinctly more suitable. K-Lath has not shown that it would be inconvenient to litigate the counterclaim in Alberta.
>
> (A.B. 92)

Discussion

[7] In our view, the learned Chambers Judge correctly disposed of the issues in the present case.

[8] First, as previously noted, at the date of this appeal, the counterclaim had not been severed from the main action. Therefore, the principles opposing the duplication of litigation must be considered.

[9] Second, the learned Chambers Judge found that Alberta possessed jurisdiction as of right over K-Lath on the basis that K-Lath is "a body corporate carrying on business in the Province of Alberta," as admitted in K-Lath's Statement of Claim. K-Lath, as the appellant, directly contradicts this assertion and maintains in its factum:

> K-Lath is clearly not a resident in Alberta: it is a division of a foreign corporation which is not registered here (nor federally), which has no physical presence here, which has no chief place of business here, and which, indeed, does not even carry on business here.
>
> (paragraph 57)

[10] Moreover, it argues that she applied the wrong test for residency by equating "carrying on business" with residency. We note that this argument was not advanced at the Chambers application.

[11] Without commenting on the correctness of Fruman J.'s reasoning, we find that Alberta does possess jurisdiction over K-Lath with respect to the counterclaim on the following grounds.

[12] As K-Lath, a foreign party, brought an action in Alberta, the Alberta courts automatically acquire jurisdiction over it with respect to any counterclaim; *Browns v. Browns,* [1919] 3 W.W.R. 903 (Alta. S.C.), aff'd [1920] 1 W.W.R. 772 (Alta. C.A.); see also *Kung v. Kung* (1990), 42 B.C.L.R. (2d) 145 (C.A.); *Island Surf Holdings v. Bank of Nova Scotia* (1987) 35 D.L.R. (4th) 259 (N.W.T.S.C.). Moreover, the appellant was properly served in the jurisdiction. Rule 93(4) contemplates that a counterclaim shall be conjoined and pleaded with the statement of defence. It follows that it can be served with the statement of defence as opposed to being viewed as an originating document that requires personal service under Rule 14. That interpretation is consistent with the concept that

once having invoked the jurisdiction of this court, a respondent should live with the consequences of that action. One of the consequences is the ability of the defendant to issue a counterclaim which must be conjoined and pleaded with the defence. On the facts of this case, the service effected upon K-Lath's solicitor of record was sufficient according to Rule 26(1).

[13] While *United Oilseed* recognized that the first person to sue should not necessarily have the benefit of the onus, it recognized that the real issue is the most appropriate forum. In any event, on the issue of onus Sopinka J. in *Amchem Products Ltd. v. British Columbia (WCB)* (1993), 102 D.L.R. (4th) 96 at 111 (S.C.C.) stated:

> The burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties. While the standard of proof remains that applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be *clearly* established to displace the forum selected by the plaintiff.
>
> (Emphasis original.)

In sum, even if the Chambers Judge used the wrong test to determine residency, we are satisfied that in this case where K-Lath had attorned to the jurisdiction by bringing an action within Alberta, the Chambers Judge did not err in placing the onus of proving forum conveniens on the proper party.

[14] The second issue to be resolved is whether the learned Chambers Judge erred in her determination that the appellant did not discharge its onus in proving that the balance of convenience favoured California or Mexico. In our view, the learned Chambers Judge properly addressed the issue. On the basis of multiple findings of fact came to the conclusion "that either Alberta or California, and perhaps even Mexico, would be a forum conveniens for the litigation, and California is not clearly or distinctly more suitable."(A.B. 92). We agree with the learned Chambers Judge that the question of whether there was clearly a more appropriate forum was complex and difficult, involving many determinations of fact. In these circumstances the standard of review is unreasonableness which favours allowing the judge's exercise of discretion to stand, see R.P. Kerans, *Standards of Review Employed by Appellate Courts* (1994) at 126. The learned Chambers Judge considered the relevant facts, and concluded that the balance of conveniens did not clearly favour California nor Mexico. The decision was not unreasonable. Therefore her exercise of discretion was proper and there is no basis upon which we should interfere with her decision.

Tab 6

In the Court of Appeal of Alberta

Citation: Dyck v Questrade, Inc., 2012 ABCA 187

Date: 20120619
Docket: 1201-0055-AC
Registry: Calgary

Between:

D. Wesley Dyck

Respondent
(Plaintiff)

- and -

Questrade, Inc.

Appellant
(Defendant)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment
Delivered from the Bench

Appeal from the Order by
The Honourable Mr. Justice P.R. Jeffrey
Dated the 24th day of January, 2012
Filed on the 16th day of February, 2012
(Docket: 1001-15075)

363 AR 201, aff'd 2007 SCC 3, [2007] 1 SCR 116; ***Jiro Enterprises Ltd. v Spencer***, 2008 ABCA 87 at para. 10. The chambers judge's conclusion that the Required Disclosures formed part of the contract does not reveal reviewable error.

[5] The plaintiff has a right to select the forum: ***Club Resorts Ltd. v Van Breda***, 2012 SCC 17 at paras. 103, 108-9, 343 DLR (4th) 577. It requires strong cause to displace the forum selected by the plaintiff, especially in the face of a forum selection clause agreed to by the parties: ***Club Resorts*** at paras. 108-9; ***Z.I. Pompey Industrie v ECU-Line N.V.***, 2003 SCC 27 at paras. 19-21, [2003] 1 SCR 450; ***Sam Lévy & Associés Inc. v Azco Mining Inc***., 2001 SCC 92 at para. 63, [2001] 3 SCR 978; ***Volkswagen Canada Inc. v Auto Haus Frohlich Ltd.*** (1986), 65 AR 271 at para. 6, 41 Alta LR (2d) 5 (CA). The appellant gave an address for service in Calgary, and once a defendant is properly served within the province, the Alberta courts have jurisdiction: ***Club Resorts*** at para. 79; R. 11.3 and 11.26. There is no overriding public policy consideration, because it is not unreasonable to expect that a company that wishes to do business in Alberta should be prepared to resolve disputes with its Albertan clients in Alberta.

[6] Here the inconvenience to the appellant arising from litigating in Alberta is offset by the inconvenience to the respondent if he was required to litigate in Ontario. On this record, there is no reason to displace the forum selected by the respondent. The appellant failed to meet the burden of showing that there was another clearly more convenient forum. The appeal is dismissed.

Slatter J.A.

[*Discussion on seeking costs for late filing of factum*.]

Paperny J.A.:

[7] In the circumstances leave is granted.

Appeal heard on June 14, 2012

Memorandum filed at Calgary, Alberta
this 19th day of June, 2012

Paperny J.A.

Tab 7

In the Court of Appeal of Alberta

Citation: Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd., 1985 ABCA 223

Date: 19850912
Docket: 18848
Registry: Edmonton

Between:

Volkswagen Canada Inc. formerly known as Volkswagen Canada Ltd.

Appellant
(Defendant)

- and -

Auto Haus Frohlich Ltd., Joseph Frohlich and Janet Frohlich

Respondents
(Plaintiffs)

The Court:

The Honourable Mr. Justice Kerans
The Honourable Mr. Justice Belzil
The Honourable Mr. Justice Agrios

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

Ms. M.J. Trussler, for the Appellant (Respondent)

G.J. Davies, Esq., for the Respondent (Plaintiffs)

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

KERANS, J.A. (for the Court):

[1] This is an appeal from a refusal by the learned chambers judge to stay the suit by the plaintiff Frohlich, et al against Volkswagen Canada, et al in enforcement of paragraph F of

the contract between the two of them which is relied upon in part in the suit by Frohlich. We do not have the benefit of recorded reasons and, accordingly, must re-hear the matter.

[2] The relevant portion of that term says that the parties

> "consent to the jurisdiction of the Courts of Ontario, which Courts shall have exclusive jurisdiction over any dispute of any kind arising out of or in connection with this Agreement"

[3] This suit is at least in part such a dispute.

[4] It is said for the appellant that term "F" ousts the jurisdiction of this court to hear this litigation. Reliance is placed upon the decision of the Saskatchewan Court of Appeal in *E.K. Motors Limited v. Volkswagen Canada Limited,* (1973) 1 W.W.R. 466. With respect, we do not accept the *obiter* in that case. One can no more oust jurisdiction by consent than confer jurisdiction by consent. Indeed the appellant. Volkswagen, by making this application invokes the jurisdiction of this court to enforce this contract: it asks this court to enforce paragraph F of this contract and require the plaintiffs to litigate in Ontario.

[5] There is a danger always that a contract which enforces some term as to choice of forum may offend public policy because it is a blatant and offensive form of formum-shopping. There is nothing of that suggestion here. We infer that this was no more than an agreement between the parties at the time that they then expected that the balance of convenience favoured Ontario in terms of litigation. Alberta and Ontario had concurrent jurisdiction and they wanted to avoid just this sort of dispute later.

[6] In our view, the court should honour terms of that sort and give effect to them unless the balance of convenience massively favours an opposite conclusion. We essentially agree with the approach taken by the English court in *The Eleftheria,* (1969) 2 All E.R. 641.

[7] We have therefore heard argument on the question of balance of convenience, remembering always that the onus of showing that the balance of convenience does not favour Ontario rests with the plaintiff, and that it is a heavy onus.

[8] Without going into a lot of detail, that onus has not been met. It may fairly be said that there is no particular balance of convenience favouring one province over the other here. The witnesses of the plaintiff will have to go to Ontario, but the witnesses of the defendant will have to come to Alberta. Alberta is no more or less convenient than Ontario. There is some possibility that Alberta law must be applied in interpreting this contract, but counsel for the

plaintiff was unable to point to any particular issue of law that might arise where the law in Ontario and the law in Alberta was different. Another factor is that there have been some preliminary steps taken already in Alberta (a statement of claim and a statement of defence).

[9] It has been suggested that a determining factor is that Volkswagen “attorned to the jurisdiction”. In our view the attornment rule applies where a court does not have jurisdiction and might rely on attornment to gain jurisdiction. It has no application in these circumstances. If Volkswagen had indeed proceeded some way along in litigation in Alberta, that would be a factor to be considered if it now suddenly asked to go to Ontario.

[10] In the end the only thing that counsel for the plaintiffs could point to as being a determining factor was that it would be more expensive for the plaintiffs to sue in Ontario than to sue in Alberta. If we had thought that fore-knowledge of that fact and a desire to take advantage of it, was the reason for the term F in the contract we might take a different view. There is no such suggestion here.

[11] Nor are we persuaded that it would be a crippling hardship for the plaintiffs to go to Ontario, assuming that to be a relevant factor. We find the balance of convenience to be even, and we therefore are of the view that the parties should honour their agreement. We allow the appeal, and enter a stay of this claim.

Tab 8

Court of Queen's Bench of Alberta

Citation: Swimwear Etc. v. Raymark Xpert Business Systems Inc., 2006 ABQB 82

Date: 20060127
Docket: 0503 16799
Registry: Edmonton

Between:

Swimwear Etc.

Plaintiff

- and -

Raymark Xpert Business Systems Inc.

Defendant

Reasons for Decision
of the
Honourable Mr. Justice M.A. Binder

I. Introduction

[1] Raymark Xpert Business Systems Inc. ("Raymark") is the Applicant and Swimwear Etc. ("Swimwear") is the Respondent in this application.

[2] Raymark is seeking a stay of the action commenced by Swimwear in Alberta, on the grounds that the *forum conveniens* for the action is Quebec.

[3] Raymark did not bring an application to set aside the order for service *ex juris*. As a result, I do not need to address whether Rule 30 has been satisfied, nor do I need to discuss in any detail whether Alberta has a real and substantial connection to this action. In my view, both Alberta and Quebec have a real and substantial connection to this action.

[4] The sole issue in this application is the determination of the *forum conveniens*.

[35] In my view, the most significant factors which come into play in this case are the fact that Quebec civil law governs the contract, and the fact that Raymark took active steps to solicit Swimwear's business in Alberta.

[36] Raymark cites a number of authorities to support its proposition that the governing law of the contract is the most important factor to consider in determining the *forum conveniens*. While I agree that in many cases, a choice of law clause is a factor militating in favour of a particular jurisdiction, it is not a determinative factor. Moreover, upon a review of Raymark's authorities, I find these authorities distinguishable.

[37] In ***Shell Canada Ltd. v. CIBC Mellon Trust Co.*** (2003), 349 A.R. 276, 2003 ABQB 1058 the court found that Alberta was a more appropriate forum than New York not only because the governing law was Canadian law, but because there was a large element of Canadian public policy involved in the decision. In this application, there is no element of Canadian public policy.

[38] In ***Thod Investment Ltd. (c.o.b. Jeff Parry Promotions) v. André-Philippe Gagnon Inc***., [2005] A.J. No. 1105, 2005 ABQB 601, the Master found that Alberta was *forum non conveniens* in a scenario where the contract specified both a choice of law clause and a choice of residence clause, and all of the parties carried on business in many of the same jurisdictions, including both Alberta and Quebec. In this application, it is common ground that Swimwear does not carry on business in Quebec, and that Swimwear's business was solicited by Raymark in Alberta.

[39] Further, in a number of cases, a particular forum was found to be *forum non conveniens* notwithstanding the existence of a choice of law or choice of jurisdiction clause in the contract: ***Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*** (1985) 65 A.R. 271 (C.A.); ***Old North State Brewing Co. v. Newlands Services Inc.*** (1998), 58 B.C.L.R. (3d) (C.A.).

[40] Swimwear refers to case authority which suggests that when a foreign defendant injures a plaintiff within the domestic jurisdiction, this favour trying the action in the domestic jurisdiction selected by the Plaintiff. In ***Moran v. Pyle National (Canada) Ltd.***, [1975] 1 S.C.R. 393 at 409, the Supreme Court of Canada stated:

> By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods

[41] While this comment was made within the context of determining the place of commission of a tort relating to a defective product causing death, I see no reason why this approach should not apply in this application. Swimwear did not initiate contact with Raymark. Rather, Raymark took unmistakable steps to solicit Swimwear's business within Alberta. When a company

Tab 9

Alberta Court of Queen's Bench
Royal Bank of Canada v. Neher
Date: 1985-07-02

D. Becker, for plaintiff.

J. Head, for defendant.

(Edmonton No. 8503-08357)

July 2, 1985.

[1] Master FUNDUK:— These are two applications, one by each party.

[2] At the time the application was heard the defendant's application to amend his statement of defence was allowed, and both counsel agreed that the plaintiff's application could proceed at that time based on the amended pleadings.

[3] The plaintiff's application is for summary judgment. The basic facts are not in dispute. The problem is with the sufficiency of the *evidence* of the substantive laws of the foreign jurisdiction.

[4] While resident in British Columbia, the defendant obtained a loan from the plaintiff, from a branch in the town where the defendant resided. The defendant also gave to the plaintiff a land mortgage on land in British Columbia as security for the loan.

[5] The defendant subsequently moved to Alberta.

[6] The plaintiff sues the defendant in debt on the "loan agreement". The defendant raises various defences, one being that the plaintiff is restricted in its remedies to the land alone.

[7] There is no doubt that the substantive laws of British Columbia apply to the transaction: *Wincal Properties Ltd. v. Cal-Alta Hldg. Ltd.,* 24 Alta. L.R. (2d) 50, [1983] 3 W.W.R. 57, 27 R.P.R. 39, 43 A.R. 223 (Q.B.). Counsel for the defendant so concedes.

[8] The statement of defence clearly pleads that the plaintiff is limited in its remedies to going against the land. The defence also pleads the Law of Property Act. Counsel for the plaintiff knew what the issue was.

[9] Counsel for the plaintiff then sought to prove the relevant laws of British Columbia by serving a notice to admit facts. It reads:

> TAKE NOTICE that the Plaintiff requires the Defendant to admit for the purposes of this cause, matter or issue only, the following *facts:*
>
> 1. That the legislation of the Province of British Columbia pertinent to land Mortgages is such that a lender under a land Mortgage is not restricted in its remedies to the land, but can enforce the personal covenant for payment contained in the land Mortgage provided the Mortgagee has not obtained an Order of Foreclosure. [The italics are mine.]

[10] Counsel for the plaintiff obviously appreciated that what the relevant substantive laws of British Columbia are *is a question of fact.* There is no such thing as a notice to admit law.

[11] The defendant responded to the notice as follows:

> TAKE NOTICE that the Defendant herein, in response to the Notice to Admit Facts filed by the Plaintiff April 24, 1985 specifically denies that the legislation of the Province of British Columbia pertinent to land mortgages is such that a lender under a land mortgage is not restricted in its remedies to the land, and further denies that such a lender can enforce the personal covenant for payment contained in the land mortgage provided the mortgagee has not obtained an order for foreclosure.

[12] Notwithstanding that, counsel for the plaintiff attempts to prove the relevant laws of British Columbia by (a) providing me with copies of various decisions from British Columbia courts, and (b) providing me with copies of the Law and Equity Act, R.S.B.C. 1979, c. 224, and the Property Law Act, R.S.B.C. 1979, c. 340.

[13] The simple answer is that an issue about what the laws of a foreign jurisdiction are is a question of fact and is accordingly *a matter of evidence: Traders Realty Ltd. v. Sibley* (1982), 20 Alta. L.R. (2d) 378, 27 C.P.C. 275 (M.C.).

[14] I am not prepared to accept reported decisions (and unreported decisions) by a foreign court as *evidence* of what the laws are *in that jurisdiction.*

[15] In addition to the point made in *Traders Realty* about that I would add a further reason. The court knows, from its own experience, that trial judgments reported in the law reports are not always the final word on a point. The court is aware of situations where a trial judgment which is reported in a law report was reversed on appeal but, for whatever reason, the law reports do not show the reversal.

[16] An example is *North West Trust Co. v. Leduc Properties Ltd.,* [1980] 5 W.W.R. 481 (Alta. Q.B.). Any counsel who relied on that decision would be in for a shock. It was reversed on appeal, without written reasons. To my knowledge the reversal does not show in any law reports, for the simple reason the publishers of the law reports usually do not know about appeals dealt with from the bench without written reasons.

Tab 10

In the Court of Appeal of Alberta

Citation: Houle v. BMW Financial Services, 2012 ABCA 333

Date: 20121116
Docket: 1103-0305-AC
Registry: Edmonton

Between:

Kevin D. Houle and Hope D. Houle

Appellants
(Applicants)

- and -

BMW Financial Services and Alternative Bailiff Services Ltd.

Respondents
(Respondents)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Stephen Hillier

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice D. Read
Dated the 20th day of October, 2011
Filed the 9th day of November, 2011
(Docket: 1103-12825)

D. Standard of Review

[15] On appeal on a question of fact, or mixed law and fact, the standard of review is deferential. We can upset fact findings or inferences only for palpable and overriding error. We see none here.

[16] Indeed, the standard of review here is deferential on two levels. The question before the chambers judge (under the section of the *California Civil Code*) was whether the creditor had "reasonably and in good faith determine[d] . . . in order to avoid repossession [the debtor had] concealed the motor vehicle or removed it from the state" (s 2983.3). That means that the test below was not whether the judge found evasion or concealment; it was whether the creditor "reasonably and in good faith determine[d]" that concealment or removal had occurred.

[17] The appellants object that the judge's reasons were about the appellants' intent, and not about the state of mind of the creditor. But that concentrates on one sentence of the reasons only. A fair reading of all the oral extempore reasons of the judge shows that she considered the test in the relevant section of the *California Civil Code*, and discussed what information the creditor was and was not given. The latter might well have been irrelevant if the creditor's state of mind were not the test.

E. Conflict of Laws

[18] A word of explanation about conflict of laws would help. The instalment sale contract here provides that the law of California governs substantive matters, and the law of the place of seizure governs procedural matters. That is in substance what Alberta conflict of laws rules (including the *Personal Property Security Act*, RSA 2000, c P-7, s 8(1)) would also provide. By Alberta law, if there is a default, the manner of seizure is irrelevant, and not a ground to attack the right to sell: *Personal Property Security Act*, s 60; Ronald Cumming and Roderick Wood, *Alberta Personal Property Security Act Handbook*, 495 (Toronto: 4th ed, 1998). Therefore, any defect in the notice of seizure, such as not reciting the right to reinstate, would have no legal effect.

[19] Foreign law (e.g. the law of California) is a question of fact in Alberta, usually to be proved by evidence of an expert in the foreign (California) law. No such expert evidence was given here, doubtless because it would not have been economical. We were given the text of the relevant section of the *California Civil Code* (s 2983.3), and both sides quoted and argued it, clearly intending that we make use of it. Given our lack of knowledge of California law, even its principles of statutory interpretation, that may seem odd. However, Alberta's rules of evidence and conflict of laws presume that foreign law is the same as Alberta law, in the absence of proof to the contrary (as here). Therefore, we have used the usual canons of construction of statutes which are applied in Canada.

F. No Tender

[20] Are we and the chambers judge correct as to whether there was evasion, concealment or removal triggering the exception to California's right to reinstate? That is not a decisive question.

Tab 11

In the Court of Appeal of Alberta

Citation: Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc., 2013 ABCA 200

Date: 20130613
Docket: 1201-0095-AC
Registry: Calgary

Between:

Benfield Corporate Risk Canada Limited

Respondent
(Applicant)

- and -

Beaufort International Insurance Inc. and Beaufort Insurance Services Inc.

Appellants
(Respondents)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Jack Watson

Memorandum of Judgment of The Majority

Dissenting Memorandum of Judgment of The Honourable Madam Justice Conrad

Appeal from the Decision by
The Honourable Mr. Justice P.B. Michalyshyn
Dated the 9th day of March, 2012
Filed on the 19th day of March, 2012
(2011 ABQB 602, Docket: 1001-04265)

[177] It is "a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evidenced from the contract as a whole [citations omitted]": *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at 23-24, 99 DLR (4th) 577.

[178] Reaching a commercially reasonable interpretation is a consideration when an agreement has two viable competing interpretations (*Consolidated-Bathurst* at 901):

> Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

[179] One may also have regard to the surrounding circumstances when interpreting a contract: *Eli Lilly* at para 55; *Dumbrell v Regional Group of Cos* (2006), 85 OR (3d) 616 at para 53, 279 DLR (4th) 201 (CA). However, surrounding circumstances play no particular role in interpreting the contract in this appeal except that the nature of the business and the importance of Simpson's experience gives a sense of why the parties were dealing with these issues.

[180] Even without a clause explicitly binding separate contracts into a single agreement, courts have held that where related agreements with overlapping parties are used to effect a single transaction, the contracts should be interpreted in light of each other. In *3869130 Canada Inc v ICB Distribution Inc*, 2008 ONCA 396, 239 OAC 137, Blair J.A. observed that two sets of parties, consisting of both companies and individuals, had "entered into a series of contracts in order to give effect to the 'deal'" they wished to strike: at para 33. Similarly, in this case, the APA requires the execution of the employment agreement, and the employment agreement directly refers to the APA. In *3869130 Canada Inc*, support for this view was found in John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc, 2005) at 715:

> Many transactions, especially large commercial transactions such as the purchase and sale of a large and complex business, may involve the execution of several agreements. In such contexts, it is an interesting question, then, whether in the interpretation of one of the agreements, regard may be had to the others. The basic principle is that such regard may be had only where the agreements essentially form components of one larger transaction. **Where each agreement is entered into on the faith of the others being executed and where it is intended that each agreement form part of a larger composite whole, assistance in the interpretation of any particular agreement may be drawn from the related agreements.**
> [Emphasis in original and citations omitted]

Tab 12

Greenwood Shopping Plaza Limited (*Plaintiff*) *Appellant*;

and

Robert Walker Beattie and Roy Vincent Pettipas (*Defendants*) *Respondents*.

1980: January 24; 1980: June 17.

Present: Ritchie, Pigeon, Dickson, Beetz and McIntyre JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, APPEAL DIVISION

Contracts — Privity of contract — Landlord and tenant — Whether insurance clauses in a lease agreement exempted tenant's employees from liability — Agency — Trust — Written agreement contradicted.

The appellant is the owner of a shopping centre in Nova Scotia. The respondents were employees of a company, Neil J. Buchanan Limited, which became a tenant of the appellant in 1972. The lease included, in paras. 14 and 15, the provisions which covered insurance of the demised premises and under which the lessor was to insure the buildings against fire or, if itself unable to procure insurance, to permit the lessee to acquire insurance on behalf of the lessor (para. 14) and under which both the lessor and the lessee were to arrange with their respective insurers not to grant subrogation rights for the recovery of any loss through fire occasioned by acts of the other (para. 15).

Neither party took any steps towards the performance of these agreements, though both parties were partially insured. On March 3, 1976, a fire which started in the premises leased by the company destroyed part of the shopping centre. The fire was caused by the negligence of the respondents, acting in the course of their employment. The action was brought on behalf of the appellant for the recovery of its uninsured loss and on behalf of its fire insurers by way of subrogation for moneys paid to the appellant by the insurers.

At trial, the company, as the employer, was held vicariously liable in damages, but the judge held that the company was not liable to the appellant for losses which the appellant failed to insure against, or under any subrogated claim on behalf of the appellant's insurers, and that the respondents, as employees, could no more be sued by the appellant than the company itself. The Court of Appeal dismissed the appeal, being of the opinion that the landlord's covenant in the lease includ-

Greenwood Shopping Plaza Limited (*Demanderesse*) *Appelante*;

et

Robert Walker Beattie et Roy Vincent Pettipas (*Défendeurs*) *Intimés*.

1980: 24 janvier; 1980: 17 juin.

Présents: Les juges Ritchie, Pigeon, Dickson, Beetz et McIntyre.

EN APPEL DE LA DIVISION D'APPEL DE LA COUR SUPRÊME DE LA NOUVELLE-ÉCOSSE

Contrats — Relativité des contrats — Propriétaire et locataire — Clauses d'assurance d'un bail exonérant ou pas les employés du locataire de leur responsabilité — Mandat — Fiducie — Contradiction d'une entente écrite.

L'appelante est propriétaire d'un centre commercial en Nouvelle-Écosse. Les intimés étaient des employés de la compagnie Neil J. Buchanan Limited, qui en 1972 est devenue locataire de l'appelante. Les clauses 14 et 15 du bail traitent de l'assurance des lieux loués. Le bailleur devait assurer les bâtiments contre l'incendie ou s'il ne pouvait lui-même obtenir une assurance, il devait autoriser le preneur à en obtenir une en son nom (clause 14). Le bailleur et le preneur devaient s'entendre avec leurs assureurs respectifs pour ne pas leur accorder de droits de subrogation pour le recouvrement de toute perte résultant d'un incendie provoqué par le fait de l'autre (clause 15).

Aucune des parties n'a fait de démarches pour donner suite à ces dispositions quoique les deux parties fussent partiellement assurées. Le 3 mars 1976, un incendie a pris naissance dans les lieux loués par la compagnie et a détruit une partie du centre commercial. L'incendie est dû à la négligence des intimés dans l'exécution de leurs fonctions. L'action est intentée au nom de l'appelante qui cherche à se faire indemniser pour la perte non-assurée et au nom de ses assureurs contre l'incendie par voie de subrogation en vue de recouvrer les sommes qu'ils lui ont versées.

En première instance, la compagnie à titre d'employeur a été jugée responsable du fait d'autrui et tenue à des dommages-intérêts, mais le juge a conclu que la compagnie n'était ni responsable envers l'appelante des pertes contre lesquelles celle-ci ne s'était pas assurée ni responsable en vertu d'une subrogation exercée au nom des assureurs de l'appelante; il a aussi conclu que pas plus que la compagnie, les intimés, à titre d'employés, ne pouvaient être poursuivis par l'appelante. La Cour d'ap-

of those provisions and thereby receive the same protection as that afforded to the company, their employer, who was otherwise equally liable with them for their negligence.

This question, it was argued by the appellant, had been settled in England since *Tweddle v. Atkinson*[7]. It was restated in *Dunlop Pneumatic Tyre Co. and Selfridge and Co.*[8], and put beyond doubt by the more recent *Scruttons Ltd. v. Midland Silicones Ltd., supra*. This authority was approved in this Court in *Canadian General Electric Co. Ltd. v. Pickford & Black Ltd., supra*, and thus the law in Canada has been settled upon this point.

The respondent contended that the case turned on a finding of fact made in the Courts below that the employees of the tenant were within the contemplation of the parties when the agreement regarding insurance revealed in paras. 14 and 15 of the lease was made and they were therefore entitled to its benefit. The effect of the argument was that the employees, if not formal parties to the contract, were nevertheless intended objects of its benefits along with their employer and accordingly the trial judgment was correct. In the alternative, it was contended that the *Midland Silicones* case had not settled the law in Canada and that the point relied upon by the appellant was still open in this Court.

The rule relating to privity of contract has been stated in many authorities in sometimes varying form, but a convenient expression may be found in *Anson's Law of Contract*, 25th ed., 1979, p. 411, in these terms:

We come now to deal with the effects of a valid contract when formed, and to ask, To whom does the obligation extend? What are the limits of a contractual agreement? This question must be considered under two separate headings: (1) the imposition of liabilities upon a third party, and (2) the acquisition of rights by a third party. We shall see that the general rule of the common law is that no one but the parties to a contract can be

[7] (1861), 1 B.S. 393.
[8] [1915] A.C. 847 (H.L.).

ces dispositions et, de ce fait, recevoir la même protection que celle accordée à la compagnie, leur employeur, qui était, par ailleurs, responsable au même titre que ses employés de la négligence de ces derniers.

L'appelante fait valoir que cette question est réglée en Angleterre depuis l'arrêt *Tweddle v. Atkinson*[7]. Elle a été posée à nouveau dans *Dunlop Pneumatic Tyre Co. and Selfridge and Co.*[8], et définitivement résolue dans un arrêt plus récent *Scruttons Ltd. v. Midland Silicones Ltd.*, précité. Cette Cour a approuvé ce dernier arrêt dans *Canadian General Electric Co. Ltd. c. Pickford & Black Ltd.*, précité, et donc le droit au Canada est fixé sur ce point.

Les intimés font valoir que l'affaire dépend d'une conclusion de fait des tribunaux d'instance inférieure selon laquelle lorsque les parties ont conclu l'entente sur l'assurance énoncée par les clauses 14 et 15 du bail, elles entendaient qu'elle s'applique aux employés du preneur et que, par conséquent, ceux-ci ont le droit d'en bénéficier. L'effet de l'argument est que, sans être explicitement parties au contrat, les employés n'en sont pas moins des bénéficiaires au même titre que leur employeur et que le jugement de première instance est donc bien fondé. Les intimés allèguent, à titre subsidiaire, que l'arrêt *Midland Silicones* ne fixe pas les principes de droit applicables au Canada et que cette Cour n'a pas encore statué sur le point invoqué par l'appelante.

La règle en matière de relativité des contrats a été énoncée dans la doctrine et la jurisprudence de diverses façons, mais c'est dans *Anson's Law of Contract*, 25e éd, 1979, que l'on trouve la formulation la plus utile (p. 411):

[TRADUCTION] Passons maintenant à l'étude des effets d'un contrat validement formé. Demandons-nous qui sont les parties à qui incombent les obligations? Quelles sont les limites d'une entente contractuelle? Cette question se divise en deux parties: 1) l'imposition de responsabilités à un tiers et 2) l'acquisition de droits par un tiers. Nous verrons qu'en *common law*, la règle générale est que nul autre que les parties à un contrat ne peut

[7] (1861), 1 B.S. 393.
[8] [1915] A.C. 847 (Ch.L.).

bound by it, or entitled under it. This principle is known as that of privity of contract.

Paragraphs 14 and 15 of the lease are part of a valid contract between Greenwood and the company which confers rights and liabilities upon each of them and for which there was the necessary consideration. It is clear as well that in entering into that contract the parties were fully aware of the use to which the employer would put the demised premises and that the company would engage employees. There was at least some awareness of the risk of fire attendant upon such use because the parties agreed to guard against it by insurance arrangements. Whatever may have been in the minds of the contracting parties, however, the employees who seek the protection of paras. 14 and 15 were not parties to the contract and, according to the common law of contract, may neither sue to enforce nor benefit from it. We have here at most a contract where "A" and "B" entered into certain covenants for their mutual protection, from which it is said benefits were to flow to "C" and "D". There are many authorities for the proposition that save for certain exceptions, of which agency and trust afford examples, "C" and "D" in the illustration above can take no benefit under the contract.

The rule of privity has not always been applied with the rigor which has developed during modern times. It has been clear, however, since *Tweddle v. Atkinson* that the rule has had decisive effect in this branch of the law. There are many cases which have applied this principle but those most commonly referred to in England in recent times are *Dunlop Pneumatic Tyre Co. v. Selfridge and Company*, decided in 1915, and *Scruttons Ltd. v. Midland Silicones Ltd.*, decided in 1962, both in the House of Lords. The law on this point has been settled in England. In Canada, the same rule has generally been followed. In this Court, in *Canadian General Electric Co. Ltd. v. Pickford & Black Ltd.*, the case of *Scruttons Ltd. v. Midland Silicones Ltd.*, was adopted and approved as correctly stating the law but on facts which involved an

être lié par celui-ci ou avoir des droits en découlant. Ce principe est connu comme celui de la relativité des contrats.

Les clauses 14 et 15 du bail font partie d'un contrat valide entre Greenwood et la compagnie, aux termes duquel chacun des contractants a des droits et des obligations et pour lequel il y a eu la contrepartie nécessaire. Il est tout aussi évident qu'en concluant ce contrat, les parties étaient tout à fait au courant de l'utilisation que ferait l'employeur des lieux loués et de ce que la compagnie embaucherait des employés. Puisqu'elles se sont mises d'accord pour se garantir contre le risque d'incendie en concluant des ententes à cet effet, les parties étaient au moins partiellement au courant du risque d'incendie correspondant à cette utilisation. Toutefois, quel que soit le but recherché par les cocontractants, il reste que les employés qui cherchent à être garantis par les clauses 14 et 15 ne sont pas parties au contrat et que, conformément au droit des contrats en *common law*, ils ne peuvent ni intenter de poursuites pour le faire respecter ni s'en prévaloir. Nous sommes tout au plus en présence d'un contrat en vertu duquel «A» et «B» ont pris certains engagements en vue de leur protection mutuelle dont «C» et «D», allègue-t-on, devraient bénéficier. De nombreux arrêts étayent la proposition que, sauf certaines exceptions, dont le mandat et la fiducie, «C» et «D» ne peuvent bénéficier du contrat.

La règle de la relativité des contrats n'a pas toujours été appliquée avec la rigueur que l'on connaît aujourd'hui. Il est clair toutefois depuis *Tweddle v. Atkinson* qu'elle a eu un effet décisif dans ce domaine du droit. De nombreux arrêts ont appliqué ce principe, mais les arrêts les plus couramment cités en Angleterre actuellement sont *Dunlop Pneumatic Tyre Co. v. Selfridge and Company* et *Scruttons Ltd. v. Midland Silicones Ltd.* rendus respectivement en 1915 et en 1962 par la Chambre des lords. Le droit en cette matière a été dit en Angleterre. Les tribunaux canadiens ont de façon générale suivi la même règle. Dans *Canadian General Electric Co. Ltd. c. Pickford & Black Ltd.*, cette Cour a adopté et approuvé l'arrêt *Scruttons Ltd. v. Midland Silicones Ltd.*, comme un énoncé correct du droit, mais les faits y met-

Tab 13

London Drugs Limited *Appellant*

v.

Dennis Gerrard Brassart and Hank Vanwinkel *Respondents*

and

Kuehne & Nagel International Ltd. and Federal Pioneer Limited *Third Parties*

and

General Truck Drivers and Helpers Local Union No. 31 *Intervener*

INDEXED AS: LONDON DRUGS LTD. *v.* KUEHNE & NAGEL INTERNATIONAL LTD.

File No.: 21980.

1991: October 29; 1992: October 29.

Present: La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin, Stevenson* and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Negligence — Duty of care — Transformer being stored in warehouse facility — Warehouse employees negligently damaging transformer — Whether employees owed duty of care to employer's customer — Whether employees can benefit from limitation of liability clause in contract of storage between employer and customer.

Contracts — Privity of contract — Limitation of liability clause — Transformer being stored in warehouse facility — Warehouse employees negligently damaging transformer — Whether employees owed duty of care to employer's customer — Whether employees can benefit from limitation of liability clause in contract of storage between employer and customer.

The appellant delivered a transformer to a warehouse company for storage pursuant to the terms and conditions of a standard form contract, which included a limi-

* Stevenson J. took no part in the judgment.

London Drugs Limited *Appelante*

c.

Dennis Gerrard Brassart et Hank Vanwinkel *Intimés*

et

Kuehne & Nagel International Ltd. et Federal Pioneer Limited *Mises en cause*

et

General Truck Drivers and Helpers Local Union No. 31 *Intervenant*

RÉPERTORIÉ: LONDON DRUGS LTD. *c.* KUEHNE & NAGEL INTERNATIONAL LTD.

N° du greffe: 21980.

1991: 29 octobre; 1992: 29 octobre.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin, Stevenson* et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Responsabilité délictuelle — Négligence — Obligation de diligence — Transformateur gardé dans un entrepôt — Transformateur endommagé en raison de la négligence d'employés de l'entrepôt — Les employés avaient-ils une obligation de diligence à l'égard du client de l'employeur? — Les employés peuvent-ils invoquer la clause de limitation de responsabilité du contrat d'entreposage conclu par l'employeur et le client?

Contrats — Lien contractuel — Clause de limitation de responsabilité — Transformateur gardé dans un entrepôt — Transformateur endommagé en raison de la négligence d'employés de l'entrepôt — Les employés avaient-ils une obligation de diligence à l'égard du client de l'employeur? — Les employés peuvent-ils invoquer la clause de limitation de responsabilité du contrat d'entreposage conclu par l'employeur et le client?

L'appelante a livré à une entreprise d'entreposage un transformateur qui devait être entreposé conformément aux modalités d'un contrat type, qui comportait une

* Le juge Stevenson n'a pas pris part au jugement.

believe that this Court is presented with an appropriate factual opportunity in which to reconsider the scope of this doctrine and decide whether its application in cases such as the one at bar should be limited or modified. It is my opinion that commercial reality and common sense require that it should.

Before proceeding with my analysis I wish to state that, in view of the approach I adopt, it will be unnecessary for me to determine whether or not the respondents' liability is, as argued by Southin J.A. in dissent, governed by the law of trespass and not the law of negligence. Indeed, as I am of the opinion that the respondents owed a duty of care and that they may benefit from the limitation of liability clause without resorting to a tort analysis, a conclusion that they are liable in trespass rather than in negligence would change nothing in the disposition of this appeal. I must add, however, that I have some doubts as to the correctness of the conclusions of law made by Southin J.A. on this matter. In this respect, I would adopt the comments made by Professor Swadling, *supra*, at pp. 221-23 of his commentary.

I will now turn to the heart of the present appeal, namely, privity of contract and third party beneficiaries. In dealing with this issue, I would like briefly to review what is understood by the doctrine of privity of contract, the decisions that support it, the reasons behind the doctrine, criticisms of the doctrine, and its treatment in other jurisdictions. I shall then go on to discuss previous decisions of this Court on the matter before turning to the doctrine in the circumstances of this appeal.

(3) The Doctrine of Privity of Contract and Third Party Beneficiaries

(a) *Introduction*

The doctrine of privity of contract has been stated by many different authorities sometimes with varying effect. Broadly speaking, it stands for the proposition that a contract cannot, as a general

après, je crois que notre Cour a ici l'occasion de réexaminer la portée de ce principe et de décider si son application à des cas semblables à l'espèce devrait être limitée ou modifiée. J'estime que la réalité commerciale et le bon sens exigent qu'elle le soit.

Avant d'entreprendre mon analyse, je tiens à préciser qu'en raison de la méthode que j'adopte, il ne me sera pas nécessaire de déterminer si la responsabilité des intimés est, comme l'a prétendu le juge Southin dans sa dissidence, régie par le droit relatif à l'atteinte à la possession mobilière plutôt que par le droit relatif à la négligence. En effet, comme je suis d'avis que les intimés avaient une obligation de diligence et qu'ils peuvent bénéficier de la clause de limitation de la responsabilité sans qu'il soit nécessaire de recourir à une analyse délictuelle, conclure qu'ils ont commis une atteinte à la possession mobilière et non une négligence ne modifierait en rien l'issue du présent pourvoi. Je dois néanmoins ajouter que je doute quelque peu de la justesse des conclusions de droit tirées par le juge Southin sur ce point. À cet égard, je mentionnerais les propos que tient le professeur Swadling, *loc. cit.*, aux pp. 221 à 223 de son commentaire.

Je reviens maintenant au cœur du présent pourvoi, savoir le principe du lien contractuel et les tiers bénéficiaires. En abordant cette question, j'aimerais examiner brièvement ce qu'on entend par le principe du lien contractuel, les décisions qui l'appuient et les motifs qui le sous-tendent, les critiques exprimées à son égard et la façon de le traiter dans d'autres ressorts. J'analyserai ensuite les arrêts déjà prononcés par notre Cour en la matière avant de passer à l'examen du principe dans le contexte du présent pourvoi.

3) Le principe du lien contractuel et les tiers bénéficiaires

a) *Introduction*

Le principe du lien contractuel a été énoncé à maintes reprises dans la doctrine et la jurisprudence, avec parfois plus ou moins d'effet. De manière générale, ce principe veut qu'un contrat

rule, confer rights or impose obligations arising under it on any person except the parties to it: see, for example, *Anson's Law of Contract* (25th ed. 1979), at p. 411, cited by McIntyre J. for this Court in *Greenwood Shopping Plaza Ltd., supra*, at p. 236; G. H. Treitel, *The Law of Contract* (8th ed. 1991), at pp. 523-75; *Cheshire, Fifoot and Furmston's Law of Contract* (12th ed. 1991), at pp. 450-68; and *Chitty on Contracts* (25th ed. 1983), vol. I, at pp. 662-91. It is now widely recognized that this doctrine has two very distinct components or aspects. On the one hand, it precludes parties to a contract from imposing liabilities or obligations on third parties. On the other, it prevents third parties from obtaining rights or benefits under a contract; it refuses to recognize a *jus quaesitum tertio* or a *jus tertii*. This latter aspect has not only applied to deny complete strangers from enforcing contractual provisions but has also applied in cases where the contract attempts, either expressly or impliedly, to confer benefits on a third party. In other words, it has equally applied in cases involving third party beneficiaries. This appeal is concerned only with the second aspect of privity, and particularly with its application to third party beneficiaries. Nothing in these reasons should be taken as affecting in any way the law as it relates to the imposition of obligations on third parties.

The decisions most often cited in Canadian courts in support of the doctrine of privity are: *Tweddle v. Atkinson* (1861), 1 B. & S. 393, 121 E.R. 762; *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847 (H.L.); *Scruttons Ltd. v. Midland Silicones Ltd., supra*; *Canadian General Electric, supra*; and *Greenwood Shopping Plaza, supra*. As confirmed by these and other decisions, privity of contract is an established principle of contract law. It is not, however, an ancient principle. As noted by this Court in *Greenwood Shopping Plaza*, at p. 237, the doctrine "has not always been applied with the rigor which has developed during modern times". Indeed, many have noted earlier decisions in the English com-

ne confère des droits ou n'impose des obligations qu'aux personnes qui y sont parties: voir, par exemple, *Anson's Law of Contract* (25e éd. 1979), à la p. 411, cité par le juge McIntyre, au nom de notre Cour, dans *Greenwood Shopping Plaza Ltd.*, précité, à la p. 236, G. H. Treitel, *The Law of Contract* (8e éd. 1991), aux pp. 523 à 575, *Cheshire, Fifoot et Furmston's Law of Contract* (12e éd. 1991), aux pp. 450 à 468, et *Chitty on Contracts* (25e éd. 1983), vol. I, aux pp. 662 à 691. Il est désormais généralement admis que ce principe comporte deux éléments ou aspects très distincts. D'une part, il empêche les parties à un contrat d'imposer des responsabilités ou des obligations à des tiers. D'autre part, il empêche les tiers de bénéficier des droits ou des avantages que confère un contrat; il fait obstacle à la reconnaissance des droits des tiers (*jus quaesitum tertio* ou *jus tertii*). Ce dernier aspect a été appliqué non seulement pour empêcher de parfaits étrangers au contrat de faire exécuter des dispositions de celui-ci, mais également lorsque les parties tentent expressément ou implicitement, dans le contrat, de conférer un avantage à un tiers. En d'autres termes, il s'est également appliqué dans des cas où il était question de tiers bénéficiaires. Le présent pourvoi ne porte que sur le second aspect du principe du lien contractuel et, plus particulièrement, sur son application aux tiers bénéficiaires. Les présents motifs ne doivent pas être interprétés comme modifiant de quelque manière le droit applicable à l'imposition d'obligations à des tiers.

Voici les arrêts qui sont le plus souvent cités, devant les tribunaux canadiens, à l'appui du principe du lien contractuel: *Tweddle c. Atkinson* (1861), 1 B. & S. 393, 121 E.R. 762, *Dunlop Pneumatic Tyre Co. c. Selfridge & Co.*, [1915] A.C. 847 (H.L.), *Scruttons Ltd. c. Midland Silicones Ltd.*, précité, *Canadian General Electric*, précité, et *Greenwood Shopping Plaza*, précité. Ces arrêts ainsi que d'autres décisions confirment que le principe du lien contractuel est un principe établi du droit des contrats. Ce principe n'est cependant pas ancien. Comme l'a fait remarquer notre Cour dans *Greenwood Shopping Plaza*, à la p. 237, ce principe «n'a pas toujours été appliqué [. . .] avec la rigueur que l'on connaît aujourd'hui».

mon law which have allowed third party beneficiaries to enforce contracts made for their benefit: see, for example, the review of the history by Windeyer J. in *Coulls v. Bagot's Executor and Trustee Co.*, [1967] Aust. Argus L.R. 385 (H.C.), at pp. 407-9; R. Flannigan, "Privity—The End of an Era (Error)" (1987), 103 *L.Q. Rev.* 564, at pp. 565-68; and *Carver's Carriage by Sea* (13th ed. 1982), at pp. 241-47. It is generally recognized that the law in this respect was not "settled" until the mid-nineteenth century. It is also accepted that there are certain exceptions to the doctrine of privity such as trust and agency: see *Greenwood Shopping Plaza*, *supra*, at pp. 238-41 and *ITO—International Terminal Operators*, *supra*, at pp. 784-94.

En fait, plusieurs ont souligné des décisions antérieures, dans la common law anglaise, où on a permis à des tiers bénéficiaires de faire exécuter des contrats conclus à leur profit: voir par exemple, l'historique que fait le juge Windeyer dans *Coulls c. Bagot's Executor and Trustee Co.*, [1967] Aust. Argus L.R. 385 (H.C.), aux pp. 407 à 409, R. Flannigan, «Privity—The End of an Era (Error)» (1987), 103 *L.Q. Rev.* 564, aux pp. 565 à 568, et *Carver's Carriage by Sea* (13e éd. 1982), aux pp. 241 à 247. On admet généralement que le droit applicable en la matière n'a pas été «établi» avant le milieu du XIXe siècle. On accepte également qu'il existe certaines exceptions, comme la fiducie et le mandat, au principe du lien contractuel: voir *Greenwood Shopping Plaza*, précité, aux pp. 238 à 241, et *ITO—International Terminal Operators*, précité, aux pp. 784 à 794.

Closely related to the doctrine of privity, but conceptually distinct, is the rule that consideration for a promise must move from the person entitled to sue or rely on that promise. Both rules have been used in the past, sometimes in an interchangeable manner, in order to deny third parties the right to enforce contractual provisions made for their benefit. There is some debate in academic circles, supported by *obiter dicta*, as to whether or not privity and consideration are really distinct concepts. For our purposes, however, I find it unnecessary to consider this question. I proceed on the basis that the major obstacle to the respondents' claim, as stated by the appellant, is that they are not a party to the contract from which they seek to obtain a benefit.

Liée de près au principe du lien contractuel, mais pourtant distincte, il y a la règle voulant que la contrepartie à un engagement provienne de la personne qui a le droit d'engager des poursuites fondées sur cet engagement ou de s'y fier. Les deux règles ont été invoquées dans le passé, parfois indifféremment, pour refuser à des tiers le droit de faire exécuter des dispositions contractuelles stipulées à leur profit. Certains débats théoriques, appuyés d'opinions incidentes, portent sur la question de savoir si le lien contractuel et la contrepartie constituent vraiment des notions distinctes. Toutefois, aux fins du présent pourvoi, j'estime qu'il n'est pas nécessaire d'examiner cette question. Je tiens pour acquis que le principal obstacle auquel se heurte la demande des intimés, comme l'a mentionné l'appelante, réside dans le fait qu'ils ne sont pas parties au contrat dont ils cherchent à tirer un avantage.

The reasons behind the doctrine of privity have received very little judicial attention. Professor Treitel offers perhaps the most often cited (and debated) justifications for this doctrine in his treatise *The Law of Contract*, *supra*, at pp. 527-28. Maintaining a certain distance, he claims that the denial of third party rights under a contract may be justified for four reasons: (1) a contract is a very personal affair, affecting only the parties to it; (2)

Les tribunaux se sont peu attardés aux motifs qui sous-tendent le principe du lien contractuel. Dans son ouvrage intitulé *The Law of Contract*, *op. cit.*, aux pp. 527 et 528, le professeur Treitel expose peut-être les justifications les plus citées (et discutées) de ce principe. Avec une certaine réserve, il prétend que le refus de reconnaître les droits des tiers aux termes d'un contrat peut être justifié pour quatre raisons: 1) le contrat revêt un

step for the legislature, it is not the type of incremental change that this Court should endorse.

In my opinion, a threshold requirement for employees to obtain the benefit of their employer's contractual limitation of liability clause is the express or implied stipulation by the contracting parties that the benefit of the clause will also be shared by said employees. Without such a stipulation, it is my view that the employees are in a no better situation than this Court held those employees involved in *Greenwood Shopping Plaza*, *supra*, to be in, and should not therefore be able to rely on the clause as a means of defence. This Court found that the employees were strangers to the contract, as I discussed above. As for the other requirements proposed by the respondents, I agree with their substance although I would express them in a different manner.

In the end, the narrow question before this Court is: in what circumstances should employees be entitled to benefit from a limitation of liability clause found in a contract between their employer and the plaintiff (customer)? Keeping in mind the comments made earlier and the circumstances of this appeal, I am of the view that employees may obtain such a benefit if the following requirements are satisfied:

1) The limitation of liability clause must, either expressly or impliedly, extend its benefit to the employees (or employee) seeking to rely on it; and

2) the employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the plaintiff (customer) when the loss occurred.

Although these requirements, if satisfied, permit a departure from the strict application of the doctrine

cune manière de l'intention des parties contractantes. Bien qu'il puisse s'agir d'une mesure appropriée pour le législateur, ce n'est pas le genre de modification progressive que notre Cour devrait approuver.

Selon moi, une condition préliminaire pour que les employés bénéficient de la clause contractuelle de limitation de la responsabilité de leur employeur est que les parties contractantes aient stipulé expressément ou implicitement que la clause s'appliquera également aux employés. Je suis d'avis qu'en l'absence d'une telle stipulation, la situation des employés n'est pas meilleure que celle dans laquelle notre Cour a conclu que se trouvaient les employés en cause dans *Greenwood Shopping Plaza*, précité, de sorte qu'ils ne devraient pas pouvoir invoquer la clause comme moyen de défense. Comme nous l'avons vu, notre Cour a conclu que les employés étaient étrangers au contrat. Quant aux autres conditions proposées par les intimés, je suis d'accord avec leur contenu quoique je les aurais formulées différemment.

En fin de compte, la question restreinte dont est saisie notre Cour est la suivante: dans quelles circonstances les employés devraient-ils avoir le droit de bénéficier d'une clause de limitation de la responsabilité figurant dans un contrat liant leur employeur et le demandeur (le client)? Compte tenu des observations formulées précédemment et des circonstances du présent pourvoi, je suis d'avis que les employés pourront bénéficier d'une telle clause si les conditions suivantes sont remplies:

1) La clause de limitation de la responsabilité doit expressément ou implicitement s'appliquer aux employés (ou à l'employé) qui cherchent à l'invoquer;

2) Les employés (ou l'employé) qui invoquent la clause de limitation de la responsabilité devaient agir dans l'exercice de leurs fonctions et exécuter les services mêmes que visait le contrat intervenu entre leur employeur et le demandeur (le client) au moment où la perte est survenue.

Même si, une fois remplies, ces conditions permettent de déroger à l'application stricte du principe

of privity of contract, they represent an incremental change to the common law. I say "incremental change" for a number of reasons.

First and foremost, this new exception to privity is dependent on the intention of the contracting parties. An employer and his or her customer may choose the appropriate language when drafting their contacts so as to extend, expressly or impliedly, the benefit of any limitation of liability to employees. It is their intention as stipulated in the contract which will determine whether the first requirement is met. In this connection, I agree with the view that the intention to extend the benefit of a limitation of liability clause to employees may be express or implied in all the circumstances: see e.g. *Mayfair Fabrics v. Henley*, 244 A.2d 344 (N.J. 1968); *Employers Casualty Co. v. Wainwright*, 473 P.2d 181 (Colo. Ct. App. 1970) (*cert.* denied).

Second, taken as a whole, this new exception involves very similar benchmarks to the recognized agency exception, applied in *The Eurymedon* and by this Court in *ITO—International Terminal Operators*, *supra*. As discussed in the latter decision, the four requirements for the agency exception were inspired from the following passage of Lord Reid's judgment in *Midland Silicones*, *supra* (at p. 474):

> I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.

The first requirement of both exceptions is virtually identical. The second and third requirements of the agency exception are supplied by the identity of interest between an employer and his or her

du lien contractuel, elles représentent une modification progressive de la common law. Je parle de «modification progressive» pour un certain nombre de motifs.

D'abord et avant tout, cette nouvelle exception au principe du lien contractuel repose sur l'intention des parties contractantes. Un employeur et son client peuvent, au moment de rédiger leurs contrats, choisir des mots appropriés pour faire bénéficier expressément ou implicitement les employés de toute limitation de responsabilité. C'est leur intention exprimée dans le contrat qui déterminera si la première condition est remplie. À cet égard, je conviens que l'intention de faire bénéficier les employés d'une clause de limitation de la responsabilité peut être expresse ou implicite dans tous les cas: voir, par exemple, *Mayfair Fabrics c. Henley*, 244 A.2d 344 (N.J. 1968), *Employers Casualty Co. c. Wainwright*, 473 P.2d 181 (Colo. Ct. App. 1970) (*cert.* refusé).

Deuxièmement, vue dans son ensemble, cette nouvelle exception comporte des points de repère très semblables à ceux de l'exception reconnue du mandat qui a été appliquée dans l'affaire *Eurymedon* et, par notre Cour, dans l'arrêt *ITO—International Terminal Operators*, précité. Tel que mentionné dans ce dernier arrêt, les quatre conditions applicables à l'exception du mandat s'inspirent de l'extrait suivant du jugement de lord Reid dans *Midland Silicones*, précité (à la p. 474):

> [TRADUCTION] Selon moi, l'argument du mandat a une chance de succès si (1) le connaissement énonce clairement que ses dispositions limitant la responsabilité visent à protéger l'acconier, (2) si le connaissement énonce clairement que le transporteur, en plus de convenir par contrat que ces dispositions s'appliqueront à lui-même, convient aussi à titre de mandataire de l'acconier qu'elles s'appliqueront à l'acconier, (3) si le transporteur a l'autorisation de l'acconier d'agir ainsi (ou peut-être qu'une ratification ultérieure de l'acconier suffira), et (4) si toutes les difficultés concernant la contrepartie provenant de l'acconier sont surmontées.

La première condition applicable à chacune des deux exceptions est presque identique. Les deuxième et troisième conditions de l'exception du mandat découlent du fait que l'employeur et ses

Tab 14

Fraser River Pile & Dredge Ltd. *Appellant*

v.

Can-Dive Services Ltd. *Respondent*

INDEXED AS: FRASER RIVER PILE & DREDGE LTD. *v.* CAN-DIVE SERVICES LTD.

File No.: 26415.

1999: February 25; 1999: September 10.

Present: Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts — Privity of Contract — Insurance policy — Doctrine of principled exception to privity of contract — Insurance policy including waiver of subrogation — Coverage extending to charterers — Charterer negligent in sinking of barge — Barge owner recovering for loss and agreeing to sue charterer — Whether charterer can rely on waiver of subrogation clause to defend against subrogated action initiated by barge owner's insurers on basis of principled exception to the privity of contract doctrine.

A barge owned by the appellant sank while chartered to the respondent. The appellant's insurance policy included clauses waiving subrogation and extending coverage to affiliated companies and charterers. The insurers paid the appellant the fixed amount stipulated in the policy for the loss of the barge. The appellant made a further agreement with the insurers to pursue a negligence action against the respondent and to waive any right to the waiver of subrogation clause. The negligence action against the respondent was allowed at trial, and dismissed on appeal. At issue here is whether a third-party beneficiary can rely on a waiver of subrogation clause to defend against a subrogated action on the basis of a principled exception to the privity of contract doctrine.

Fraser River Pile & Dredge Ltd. *Appelante*

c.

Can-Dive Services Ltd. *Intimée*

RÉPERTORIÉ: FRASER RIVER PILE & DREDGE LTD. *c.* CAN-DIVE SERVICES LTD.

N° du greffe: 26415.

1999: 25 février; 1999: 10 septembre.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Contrats — Lien contractuel — Police d'assurance — Théorie de l'exception fondée sur des principes à la règle du lien contractuel — Police d'assurance comportant une clause de renonciation à la subrogation — Assurance protégeant les affréteurs — Négligence de la part de l'affréteur dans le naufrage d'une barge — Propriétaire de la barge indemnisé de la perte subie et acceptant de poursuivre l'affréteur — L'affréteur peut-il invoquer une clause de renonciation à la subrogation pour se défendre contre une action subrogatoire intentée par les assureurs du propriétaire de la barge en vertu d'une exception fondée sur des principes à la règle du lien contractuel?

Une barge appartenant à l'appelante a coulé alors qu'elle était affrétée à l'intimée. La police d'assurance de l'appelante comportait des clauses de renonciation à la subrogation et protégeait les sociétés affiliées et les affréteurs. Les assureurs ont versé à l'appelante le montant forfaitaire prévu par la police pour la perte de la barge. L'appelante a conclu une autre entente avec les assureurs en vue d'intenter une action fondée sur la négligence contre l'intimée et de renoncer à tout droit susceptible de découler de la clause de renonciation à la subrogation. L'action pour négligence contre l'intimée a été accueillie en première instance, mais rejetée en appel. Il s'agit en l'espèce de savoir si un tiers bénéficiaire peut invoquer une clause de renonciation à la subrogation pour se défendre contre une action subrogatoire intentée en vertu d'une exception fondée sur des principes à la règle du lien contractuel.

beneficiaries. For our purposes, I think it sufficient to make the following observations. Many have noted that an application of the doctrine so as to prevent a third party from relying on a limitation of liability clause which was intended to benefit him or her frustrates sound commercial practice and justice. It does not respect allocations and assumptions of risk made by the parties to the contract and it ignores the practical realities of insurance coverage. In essence, it permits one party to make a unilateral modification to the contract by circumventing its provisions and the express or implied intention of the parties. In addition, it is inconsistent with the reasonable expectations of all the parties to the transaction, including the third party beneficiary who is made to support the entire burden of liability. The doctrine has also been criticized for creating uncertainty in the law. While most commentators welcome, at least in principle, the various judicial exceptions to privity of contract, concerns about the predictability of their use have been raised. Moreover, it is said, in cases where the recognized exceptions do not appear to apply, the underlying concerns of commercial reality and justice still militate for the recognition of a third party beneficiary right.

27 The respondent employees in *London Drugs* were unable to rely on existing principles of trust or agency. Rather than adapting these established principles to accommodate yet another *ad hoc* exception to the doctrine of privity, it was decided to adopt a more direct approach as a matter of principle. The Court held that, in circumstances where the traditional exceptions do not apply, the relevant functional inquiry is whether the doctrine should be relaxed in the given circumstances.

28 In order to distinguish mere strangers to a contract from those in the position of third-party beneficiaries, the Court first established a threshold requirement whereby the parties to the contract must have intended the relevant provision to confer a benefit on the third party. In other words, an employer and its customer may agree to extend, either expressly or by implication, the benefit of any limitation of liability clause to the employees. In the circumstances of *London Drugs*, the customer had full knowledge that the storage services contemplated by the contract would be provided

préoccupations dans la mesure où il concerne des tiers bénéficiaires. Aux fins du présent pourvoi, je crois qu'il suffit de formuler les observations suivantes. Bien des personnes ont souligné que l'application du principe aux fins d'empêcher un tiers d'invoquer une clause de limitation de la responsabilité qui était destinée à lui profiter est contraire à la pratique commerciale et à la justice. Elle ne respecte pas la répartition et l'acceptation des risques par les parties au contrat et elle fait fi des réalités pratiques de la garantie d'assurance. Elle permet essentiellement à une partie de modifier unilatéralement le contrat en contournant ses dispositions et l'intention expresse ou implicite des parties. En outre, elle est incompatible avec les attentes raisonnables de chacune des parties à l'opération, y compris le tiers bénéficiaire qui doit alors assumer l'entière responsabilité. On a également reproché au principe de rendre le droit incertain. Bien que la plupart des commentateurs soient favorables, du moins en principe, aux diverses exceptions reconnues par les tribunaux à l'égard du principe du lien contractuel, on s'est interrogé sur la prévisibilité de leur utilisation. De plus, on affirme que, dans les cas où les exceptions reconnues ne semblent pas s'appliquer, les intérêts sous-jacents de la réalité commerciale et de la justice militent encore en faveur de la reconnaissance d'un droit aux tiers bénéficiaires.

Les employés intimés dans *London Drugs* n'étaient pas en mesure d'invoquer les principes existants de la fiducie ou du mandat. Au lieu d'adapter ces principes reconnus de manière à tenir compte d'une autre exception particulière à la règle du lien contractuel, il a été décidé d'adopter une méthode plus directe pour des raisons de principe. La Cour a statué que, lorsque les exceptions traditionnelles ne s'appliquent pas, la question pratique pertinente est de savoir s'il y a lieu d'assouplir la règle dans les circonstances en cause.

Pour établir une distinction entre de simples étrangers à un contrat et des tiers bénéficiaires, la Cour a d'abord fixé la condition préliminaire selon laquelle les parties au contrat doivent avoir voulu que la disposition pertinente confère un avantage au tiers. En d'autres termes, un employeur et son client peuvent convenir d'étendre expressément ou implicitement aux employés l'application d'une clause de limitation de responsabilité. Dans l'affaire *London Drugs*, le client savait parfaitement que les services d'entreposage prévus au contrat seraient fournis non seulement par l'employeur,

not only by the employer, but by the employees as well. In the absence of any clear indication to the contrary, the Court held that the necessary intention to include coverage for the employees was implied in the terms of the agreement. The employees, therefore, as third-party beneficiaries, could seek to rely on the limitation clause to avoid liability for the loss to the customer's property.

The Court further held, however, that the intention to extend the benefit of a contractual provision to the actions of a third-party beneficiary was irrelevant unless the actions in question came within the scope of agreement between the initial parties. Accordingly, the second aspect of the functional inquiry was whether the employees were acting in the course of their employment when the loss occurred, and whether in so acting they were performing the very services specified in the contract between their employer and its customer. Based on uncontested findings of fact, it was clear that the damage to the customer's transformer occurred when the employees were acting in the course of their employment to provide the very storage services specified in the contract.

Taking all of these circumstances into account, the Court interpreted the term "warehouseman" in the limitation of liability clause to include coverage for the employees, thereby absolving them of any liability in excess of $40 for the loss that occurred. The Court concluded that the departure from the traditional doctrine of privity was well within its jurisdiction representing, as it did, an incremental change to the common law rather than a wholesale abdication of existing principles. Given that the exception was dependent on the intention stipulated in the contract, relaxing the doctrine of privity in the given circumstances did not frustrate the expectations of the parties.

2. Application of the Principled Exception to the Circumstances of this Appeal

As a preliminary matter, I note that it was not our intention in *London Drugs*, *supra*, to limit

mais aussi par les employés. En l'absence d'indications contraires manifestes, la Cour a conclu que l'intention nécessaire d'inclure la protection des employés ressortait implicitement du texte de l'entente. Les employés pouvaient donc, en tant que tiers bénéficiaires, chercher à invoquer la clause de limitation de responsabilité en vue d'échapper à toute responsabilité pour la perte du bien du client.

29 La Cour a toutefois ajouté que l'intention d'étendre l'application d'une disposition contractuelle aux actes d'un tiers bénéficiaire n'était pertinente que si les actes en question étaient visés par l'entente intervenue entre les parties initiales. Par conséquent, le deuxième aspect de la question pratique était de savoir si les employés agissaient dans l'exercice de leurs fonctions au moment où la perte est survenue et si, ce faisant, ils fournissaient les services mêmes qui étaient mentionnés dans le contrat intervenu entre leur employeur et son client. Selon des conclusions de fait non contestées, il était clair que, au moment où le transformateur du client a été endommagé, les employés agissaient dans l'exercice de leurs fonctions consistant à fournir les services mêmes d'entreposage prévus au contrat.

30 Compte tenu de toutes ces circonstances, la Cour a considéré que le terme «entreposeur» utilisé dans la clause de limitation de responsabilité incluait les employés aux fins de l'application de cette clause, ce qui avait pour effet de limiter à 40 $ leur responsabilité pour la perte survenue. La Cour a conclu que cette dérogation à la règle traditionnelle du lien contractuel relevait bel et bien de sa compétence, puisqu'elle représentait une modification progressive de la common law et non pas un rejet systématique de principes existants. Comme cette exception était subordonnée à l'intention stipulée au contrat, l'assouplissement de la règle du lien contractuel dans les circonstances en cause ne déjouait pas les attentes des parties.

2. Application de l'exception fondée sur des principes aux circonstances du présent pourvoi

31 Tout d'abord, je souligne que, dans l'arrêt *London Drugs*, précité, la Cour n'avait pas l'inten-

application of the principled approach to situations involving only an employer-employee relationship. That the discussion focussed on the nature of this relationship simply reflects the prudent jurisprudential principle that a case should not be decided beyond the scope of its immediate facts.

32 In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, regard must be had to the emphasis in *London Drugs* that a new exception first and foremost must be dependent upon the intention of the contracting parties. Accordingly, extrapolating from the specific requirements as set out in *London Drugs*, the determination in general terms is made on the basis of two critical and cumulative factors: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

(a) *Intentions of the Parties*

33 As to the first inquiry, Can-Dive has a very compelling case in favour of relaxing the doctrine of privity in these circumstances, given the express reference in the waiver of subrogation clause to "charterer(s)", a class of intended third-party beneficiaries that, on a plain reading of the contract, includes Can-Dive within the scope of the term. Indeed, there is no dispute between the parties as to the meaning of the term within the waiver of subrogation clause; disagreement exists only as to whether the clause has legal effect. Accordingly, there can be no question that the parties intended to extend the benefit in question to a class of third-party beneficiaries whose membership includes Can-Dive. Given the lack of ambiguity on the face of the provision, there is no need to resort to extrinsic evidence for the purposes of determining otherwise. If the parties did not intend the waiver of subrogation clause to be extended to third-party

tion de limiter l'application de la méthode fondée sur des principes aux cas où il n'est question que d'une relation employeur-employé. Le fait que l'analyse a porté sur la nature de cette relation traduit simplement le principe jurisprudentiel prudent qui veut qu'une affaire soit décidée strictement en fonction de son contexte factuel immédiat.

Pour ce qui est d'élargir la méthode fondée sur des principes de manière à créer une nouvelle exception à la règle du lien contractuel qui s'applique aux circonstances du pourvoi, il faut tenir compte de l'accent mis, dans *London Drugs*, sur le fait qu'une nouvelle exception doit d'abord et avant tout être subordonnée à l'intention des parties contractantes. Par conséquent, si on extrapole à partir des exigences particulières énoncées dans l'arrêt *London Drugs*, la décision générale repose sur deux facteurs cruciaux et cumulatifs: a) les parties au contrat avaient-elles l'intention d'accorder le bénéfice en question au tiers qui cherche à invoquer la disposition contractuelle? et b) les activités exercées par le tiers qui cherche à invoquer la disposition contractuelle sont-elles les activités mêmes qu'est censé viser le contrat en général, ou la disposition en particulier, là encore compte tenu des intentions des parties?

a) *Les intentions des parties*

En ce qui concerne la première question, Can-Dive dispose d'un argument très convaincant en faveur de l'assouplissement de la règle du lien contractuel dans les circonstances de la présente affaire, en raison de la mention expresse des «affréteurs» dans la clause de renonciation à la subrogation, lesquels représentent une catégorie de tiers bénéficiaires visés qui, selon le sens clair du contrat, comprend Can-Dive. En fait, les parties ne contestent pas le sens de ce terme dans la clause de renonciation à la subrogation; il y a désaccord uniquement sur la question de savoir si cette clause a un effet juridique. Il est donc indubitable que les parties avaient l'intention d'accorder le bénéfice en question à une catégorie de tiers bénéficiaires comprenant Can-Dive. Comme cette disposition est sans équivoque à première vue, il n'est pas nécessaire de recourir à une preuve extrinsèque pour statuer autrement. Si les parties n'avaient pas

Tab 15

COURT OF APPEAL FOR ONTARIO

CITATION: 1196303 Inc. v. Glen Grove Suites Inc., 2015 ONCA 580
DATE: 20150826
DOCKET: C58149

Weiler, Laskin and Epstein JJ.A.

BETWEEN

1196303 Ontario Inc.

Plaintiff (Respondent)

and

Glen Grove Suites Inc., Spendthrift Developments Limited,
Firm Capital Mortgage Fund Inc., Nelly Zagdanski and Linda Darer,
Estate Trustees of Sylvia Hyde, deceased,
1297475 Ontario Inc., Montreal Trust Company of Canada
and Royal Trust Corporation of Canada

Defendants (Appellants)

Micheal Simaan, for the appellants

Fred Tayar, for the respondent

Heard: February 11, 2015

On appeal from the judgment of Justice David M. Brown of the Superior Court of Justice, dated December 2, 2013, with reasons reported at 2013 ONSC 7284.

Weiler J.A.:

A. INTRODUCTION

[1] This appeal is about whether the respondent, 1196303 Ontario Ltd. ("119"), is entitled to money from the sale of a property, which has been paid into

reach of the doctrine has been significantly undermined by a growing list of exceptions to the rule" (citations omitted).

[97] The Supreme Court recognized and elaborated a principled exception to the doctrine of privity of contract respecting third party beneficiaries in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, at para. 32. The Court held the rule could be relaxed with respect to a third party beneficiary where: 1) the parties to the initial agreement intended to extend a benefit to the third party; and 2) the activities of the third party were the very activities contemplated as coming within the scope of the contract or particular provision. John D. McCamus in *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at p. 324, observes:

> The purpose of the exception is to confer upon courts, in cases where the traditional exceptions of agency and trust do not apply, a discretion to undertake the appropriate analysis, bounded by both common sense and commercial reality, in order to determine whether the doctrine of privity with respect to third-party beneficiaries should be relaxed in given circumstances. [Citations omitted.]

[98] Decisions imposing liability on a third party are fewer but they do exist. Examples are: *Seip & Associates Inc. v. Emmanuel Village Management Inc.*, 2009 ONCA 222, 247 O.A.C. 78; *Chan v. City Commercial Realty Group Ltd.*, 2011 ONSC 2854, 90 C.C.E.L. (3d) 235; *Smith v. National Money Mart* (2006),

80 O.R. (3d) 81 (C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 267; *Gasparini v. Gasparini* (1978), 20 O.R. (2d) 113 (C.A.).

[99] In *Seip*, the defendant companies, Emmanuel Village Homes (EVH), Emmanuel Village Management (EVM) and Emmanuel Village Residence (EVR), were owned and operated by the same principal, Hunking. Seip entered into a contract with EVM to consult on the construction of a retirement residence complex and to manage the property for a five-year term when the first tenant moved in. The first page of the contract named EVM and EVH, but only EVM signed the agreement. EVR was not mentioned anywhere in the agreement.

[100] The defendants EVM and EVH terminated the contract and Seip sued. The trial judge found that EVM and EVH were both parties to the contract despite it being executed only by EVM. The trial judge further found that while EVR was not initially a party to the agreement, it had bound itself to the contract, through its conduct. It purchased the complex with full knowledge of the parties' agreement. Once EVR became the owner of the retirement complex, the work continued as if nothing had changed. EVR had the same principal as the parties to the contract, and Seip was paid by EVR. EVR took the benefit of Seip's work.

[101] On appeal, the appellant submitted that the trial judge effectively pierced the corporate veil and ignored the separate legal personality of each defendant. Gillese J.A. disagreed. She held, at para. 35:

> While the trial judge noted that EVR had the same principal as the other two corporate defendants, it does not necessarily follow that the trial judge pierced the corporate veil. In my view, the trial judge treated Hunking's role in the three corporations as one piece of evidence on which to assess whether EVR had assumed the contract through its conduct and, consequently, was bound by it.

[102] Gillese J.A. also considered article 11.2 of EVM's contract with Seip, which permitted the sale of the project provided the new owner acknowledged in writing its willingness to assume Seip's contract. Although EVR did not give such written acknowledgment, the role played by Hunking in the three corporate defendants, coupled with EVR's conduct, was tantamount to such an acknowledgment. Gillese J.A. observed, at para. 38, that Hunking was the directing mind of all three corporate defendants; that Hunking was well aware that the clear intent of article 11.2 was to bind EVR, as purchaser; and that EVR by its conduct accepted the contract, and accepted the role as owner. She did not give effect to EVR's submission that, as a third party, it had no obligation under the contract, concluding, "The conduct of all parties demonstrated a common intention that the Contract continued with EVR as an owner, in conjunction with the other corporate defendants."

[103] To summarize, in *Seip*, the privity of contract rule was relaxed and liability imposed where the following three factors were present: 1) the parties to the initial agreement intended to impose an obligation on the third party; 2) the

activities of the third party, upon which basis the parties sought to impose liability, were within the scope envisaged under the agreement and 3) the third party had knowledge of the provision assigning it liability and, by its conduct, the third party assumed the agreement. The first two criteria mirror the requirements of *Fraser River, supra*. Arguably, all three criteria are present in this case.

[104] As the argument was not made that liability could be imposed based on a principled exception to the doctrine of privity of contract, nor was the decision in *Seip* the subject of submissions, it would not be fair to decide the case on a point counsel did not have the opportunity to address. Consequently, the doctrinal basis for a principled exception to the doctrine of privity of contract when liability is sought to be imposed on a third party will have to await argument another day.

(4) If Glen Grove is liable, is its liability limited to $450,000 as opposed to $500,000?

[105] One of the letters incorporated into the Settlement (the letter of August 28, 2003) amended the $500,000 obligation to $450,000. This lower amount was confirmed in the final letter of October 3, 2003. The trial judge, however, found liability remained at $500,000 and the appellant submits he therefore erred.

[106] The August 28, 2003, letter did propose to reduce the mortgage amount to $450,000, but only if $50,000 was paid to the Receiver within 30 days of court

Tab 16

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *Ocean Choice International Limited Partnership v. Landvis Canada Inc.*, 2016 NLCA 36
Date: 20160715
Docket: 201601H0049

BETWEEN:

OCEAN CHOICE INTERNATIONAL LIMITED PARTNERSHIP by its General Partner 55104 Newfoundland and Labrador Inc. — APPELLANT

AND:

LANDVIS CANADA INC. — FIRST RESPONDENT

AND:

LANDVIS, ehf. — SECOND RESPONDENT

AND:

ANDREW WISSLER — THIRD RESPONDENT

AND:

GUDJON THORBJORNSSON — FOURTH RESPONDENT

AND:

PETUR PALSSON — FIFTH RESPONDENT

authority whereby the subsidiary could contractually bind its parent without the parent's consent". (Paragraph 148.)

- "The Landsbanki Credit Agreement required subordination as a condition of financing and the execution of the LSLA was in response [to] this commercial reality at the time". (Paragraph 150); Landvis ehf sees the commercial reality at present quite differently, given its concern that it will not receive payment of interest on its loan to OCI under the terms of the proposed financing with Desjardins.

[35] There was nothing in OCI's submissions to refute persuasively the foregoing points upon which the judge relied. Rather, OCI urges this Court to adopt a test set out in Ontario case law that would result (in OCI's submission) in Landvis ehf being bound by the UUA. OCI relies principally on *Seip and Associates Inc. v. Emmanuel Village Management Inc.*, 2009 ONCA 222 and *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580.

[36] The decision in *Seip* was dealt with in *Glen Grove* in a commentary that was clearly *obiter*. *Glen Grove* was decided on the basis of agency. No such agency arrangement has been shown to exist between Landvis Canada and Landvis ehf, such that Landvis Canada was authorized by Landvis ehf to bind it to obligations in the UUA. The fact that Peter Palsson was the guiding mind for both Landvis Canada and Landvis ehf does not create any such agency.

[37] Here is what was set out in *Glen Grove*:

> [99] In *Seip*, the defendant companies, Emmanuel Village Homes (EVH), Emmanuel Village Management (EVM) and Emmanuel Village Residence (EVR), were owned and operated by the same principal, Hunking. Seip entered into a contract with EVM to consult on the construction of a retirement residence complex and to manage the property for a five-year term when the first tenant moved in. The first page of the contract named EVM and EVH, but only EVM signed the agreement. EVR was not mentioned anywhere in the agreement.
>
> [100] The defendants EVM and EVH terminated the contract and Seip sued. The trial judge found that EVM and EVH were both parties to the contract despite it being executed only by EVM. The trial judge further found that while EVR was not initially a party to the agreement, it had bound itself to the contract, through its conduct. It purchased the complex with full knowledge of the parties' agreement. Once EVR became the owner of the retirement complex, the work

continued as if nothing had changed. EVR had the same principal as the parties to the contract, and Seip was paid by EVR. EVR took the benefit of Seip's work.

[101] On appeal, the appellant submitted that the trial judge effectively pierced the corporate veil and ignored the separate legal personality of each defendant. Gillese J.A. disagreed. She held, at para. 35:

> While the trial judge noted that EVR had the same principal as the other two corporate defendants, it does not necessarily follow that the trial judge pierced the corporate veil. In my view, the trial judge treated Hunking's role in the three corporations as one piece of evidence on which to assess whether EVR had assumed the contract through its conduct and, consequently, was bound by it.

[102] Gillese J.A. also considered article 11.2 of EVM's contract with Seip, which permitted the sale of the project provided the new owner acknowledged in writing its willingness to assume Seip's contract. Although EVR did not give such written acknowledgment, the role played by Hunking in the three corporate defendants, coupled with EVR's conduct, was tantamount to such an acknowledgment. Gillese J.A. observed, at para. 38, that Hunking was the directing mind of all three corporate defendants; that Hunking was well aware that the clear intent of article 11.2 was to bind EVR, as purchaser; and that EVR by its conduct accepted the contract, and accepted the role as owner. She did not give effect to EVR's submission that, as a third party, it had no obligation under the contract, concluding, "The conduct of all parties demonstrated a common intention that the Contract continued with EVR as an owner, in conjunction with the other corporate defendants."

[103] To summarize, in *Seip*, the privity of contract rule was relaxed and liability imposed where the following three factors were present: 1) the parties to the initial agreement intended to impose an obligation on the third party; 2) the activities of the third party, upon which basis the parties sought to impose liability, were within the scope envisaged under the agreement and 3) the third party had knowledge of the provision assigning it liability and, by its conduct, the third party assumed the agreement. The first two criteria mirror the requirements of *Fraser River, supra*. Arguably, all three criteria are present in this case.

[104] As the argument was not made that liability could be imposed based on a principled exception to the doctrine of privity of contract, nor was the decision in *Seip* the subject of submissions, it would not be fair to decide the case on a point counsel did not have the opportunity to address. Consequently, the doctrinal basis for a principled exception to the doctrine of privity of contract when liability is sought to be imposed on a third party will have to await argument another day.

[38] Regarding the foregoing, I would make the following points:

- The Ontario Court of Appeal did not purport to set out definitively a test for a principled exception to the requirement for privity (see paragraph 104);

- Whatever status the foregoing passage has in Ontario, it is not binding in this jurisdiction; OCI argues that it is persuasive;

- I am skeptical about setting out a definitive statement of such a test as, based on what I have written above, it is not necessary to do so.

[39] Nonetheless, without adopting the test set out in paragraph 103 of *Glen Grove*, I will consider the facts of this case having regard to the three factors set out therein.

[40] First, did the parties to the initial agreement (the UUA) intend to impose an obligation on the third party (Landvis ehf)? It is clear that OCI intended to do so. It is less clear what Landvis Canada intended. Certainly, Landvis Canada intended that Landvis ehf would subordinate its loan to OCI to the Landsbanki financing, as that was needed for acquisition of the FPI assets. It is not at all clear that Landvis Canada intended that Landvis ehf would be bound to subordinate its loan to OCI in order to obtain financing in any and all future circumstances. Had this been the intention, Landvis ehf could have made an acknowledgement that it was so bound; no such acknowledgment was made by Landvis ehf.

[41] Second, were the activities of the third party within the scope envisaged under the agreement? One would have to say, yes. One could readily expect that a replacement lender would want Landvis ehf to subordinate its loan, as occurred when financing was provided by Labki.

[42] Third, did the third party have knowledge of the provision assigning it liability and, by its conduct, did the third party assume the agreement? Clearly, Landvis ehf had knowledge of what was set out in the UUA. (Peter Palsson was the guiding mind for both Landvis Canada and Landvis ehf.) However, "by its conduct did [Landvis ehf] assume the agreement"? It is not clear that it did. While Landvis ehf did subordinate its loan to OCI to Landsbanki and then to Labki, did it do so because it was required to do so by the UUA or did Landvis ehf do so because it chose to do so in light of the commercial realities at the relevant times? I would say the latter. In short, it has not been shown that "by its conduct [Landvis ehf] assume[d] the agreement".