Date: 19990923
Docket: C990379
Registry: VANCOUVER

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PACIFIC INTERNATIONAL SECURITIES INC.

PLAINTIFF

AND:

DRAKE CAPITAL SECURITIES INC.,
PAINEWEBBER INCORPORATED, and
CORRESPONDENT SERVICES CORPORATION

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE S.R.ROMILLY

(IN CHAMBERS)

Counsel for the Plaintiff: Edward G. Wong

Counsel for the Defendants: Timothy J. Delaney

Place and Date of Hearing: Vancouver, B.C.
September 15, 1999

FACTS

[1] The Plaintiff is a British Columbia company carrying on business as an investment dealer. Each of the Defendant companies is incorporated in the United States. None of the Defendants has an office in Canada. None of the Defendants carries on business in Canada. The Plaintiff asserts that it entered into an agreement with Drake Capital Securities Inc. ("Drake") on March 20, 1998 for the purchase of shares of 'shopping.com", a company listed on the National Association of Securities Dealers (NASD) Bulletin Board in the United States. The agreement was for 2,400 shares at $28.35 USD per share for a total cost of $68,040.00 USD for settlement on March 23, 1998. The Plaintiff did not receive the shares on the settlement date. On March 23, 1998 and April 9, 1998 the Plaintiff sent notices to Drake as well as to PaineWebber Incorporated ("PaineWebber") and Correspondent Services Corporation ("Correspondent") (Drake's clearing agents) demanding delivery of the shares. On April 20, 1998, in purported accordance with the policies and practices of the NASD, the Plaintiff effected a "buy-in" of 2,400 shares of Shopping.com for guaranteed delivery at $33.75 USD per share for a total cost of $81,000.00 USD for Drake's account. On January 25, 1999 the Plaintiff brought an action for breach of contract. The Plaintiff claims damages of $12,960.00 USD, being the difference between the original cost of $68,040.00 USD and the ultimate cost to the Plaintiff of the

shares of $81,000.00 USD.

[2] The Plaintiff purported to serve the originating process on the Defendants outside of British Columbia as of right, pursuant to Rule 13(1)(g) of the Rules of Court.

NATURE OF APPLICATIONS
Application of the Defendants

[3] By way of Notice of Motion dated March 25, 1999, the Defendants bring an application to set aside the Writ of Summons and Statement of Claim in this action. The Defendants seek an Order that service of the Writ of Summons and Statement of Claim on the Defendants is invalid on the ground that the Supreme Court of British Columbia does not have jurisdiction over this matter. The Defendants submit that the breach of contract, if any, occurred outside of British Columbia. Further, there is not a real and substantive connection between the action and British Columbia.

[4] Alternatively, if this Court does have jurisdiction of the matter, the Defendants seek an Order that this Court decline jurisdiction over this proceeding because this Court is not forum conveniens.

Application of the Plaintiff

[5] By way of Notices of Motion dated June 1, 1999 and August 30, 1999, the Plaintiff brings an application that the Defendants, within seven days of the date of the Order, file and serve an Appearance. The Plaintiff claims the right to serve the Writ of Summons and Statement of Claim on the Defendants outside of British Columbia pursuant to Rule 13(1)(g) of the Rules of Court on the grounds that the proceeding is in respect of a breach of contract in British Columbia of a contract wherever made.

[6] In the alternative, if the Defendant's application is successful and service of the pleadings is declared invalid by the Court, the Plaintiff brings an application for leave to serve the pleadings outside of British Columbia pursuant to Rule 13(3). The Plaintiff bases the application on the ground that the Court has jurisdiction over this proceeding because there is a real and substantial connection between the Court and the subject matter of the litigation. Furthermore, the Plaintiff submits that the test of forum conveniens is satisfied.

ISSUES

[7] The first issue to be decided is whether this Court has jurisdiction over this proceeding by virtue either of Rule 13(1)(g) of the Rules of Court or by virtue of a "real and substantial connection" between the subject matter and the Province of British Columbia. Second, if jurisdiction is established, should this Court decline jurisdiction?

1. Does the Supreme Court of British Columbia have jurisdiction over this proceeding by virtue of R.13(1)(g) of the Rules of Court?

[8] This issue really examines whether or not the proceeding is based on a breach of contract committed in British Columbia, and therefore whether the Plaintiff has the right to serve the Writ of Summons and Statement of Claim on the Defendants outside the Province of British Columbia. Rule 13(1)(g) of the Rules of Court is as follows:

RULE 13
SERVICE OUTSIDE BRITISH COLUMBIA

Service outside British Columbia without order"Idem

(1) Service of an originating process or other document on a person outside British Columbia may be effected without an order if

. . .

(g) the proceeding is in respect of a breach, committed in British Columbia, of a contract wherever made, even though the breach was

preceded or accompanied by a breach, outside British Columbia, which rendered impossible the performance of the part of the contract that ought to have been performed in British Columbia,

[9] The Defendants rely on the case of Rhodes v. Shorter (1981), 27 B.C.L.R. 60 (B.C.C.A.) to suggest that this proceeding does not concern a claim for a breach of contract committed in British Columbia.

[10] In Rhodes, supra, the defendants resided in California and Alberta. The Plaintiff, who was resident in British Columbia, alleged that he had entered into a contract with the defendants whereby he would provide personal services to the defendants in Alberta. The defendant in California informed the plaintiff by telephone that operations would not commence April 1, 1979 as agreed to, but rather in May 1979. An action was brought in British Columbia for breach of contract. The Court of Appeal held that an anticipatory breach on the part of the defendants occurred in California. The Court relied on the decision of Kirke Smith J. in Kellard Marble Inc. v. Cox (1979), 10 B.C.L.R. P-110 and the authorities cited by Kirke Smith J. for the proposition that "where anticipatory breach occurs by the writing of a letter, the breach occurs where the letter was mailed, and not where it was received." Taggart J.A. in Rhodes, supra went on to reason that the same interpretation should be given to a telephone conversation. Consequently, the breach of contract occurred in California.

[11] The Defendant submits that the case at bar is on all fours with Rhodes, supra and Kellard Marble Inc., supra. In particular, it is their position that the transaction which forms the basis of this action took place pursuant to telephone or other electronic correspondence originating outside of British Columbia. As such, the alleged breach, if any, took place outside of British Columbia, in the United States.

[12] The Plaintiff distinguishes the authorities cited from the case at bar on the basis that there was no anticipatory breach of the agreement between the Plaintiff and the Defendants. In particular, the Plaintiff submits that there is no evidence that the Defendants advised the Plaintiff, by telephone or otherwise, that they did not intend to deliver the Shares. To the contrary, the Defendant PaineWebber purportedly sent a notice to the Plaintiff seeking the Plaintiff's acknowledgment of the purchase of the Shares (Exhibit "B" to Thomas Affidavit). Consequently, the communication that took place between Pacific and the Defendants, be it by telephone or other means, does not constitute the ultimate breach of the contract.

[13] The Plaintiff submits that, unlike in Rhodes, the substantial or real breach of the contract was the Defendants' failure to deliver the shares to the Plaintiff in British Columbia. In other words, the Plaintiff was entitled to require the performance of part of the contract in British Columbia and a breach took place when that part was not performed.

[14] In the alternative, Pacific submits that a breach should be taken to occur in British Columbia where damage is suffered in British Columbia. Here, the Plaintiff was forced to pay an additional $12,960.00 USD on a "buy-in" to guarantee delivery of the shares to its client. Therefore, the damage occurred in British Columbia. No authority was cited by Pacific for the proposition that a breach should be taken to occur where damage is suffered.

[15] In sum, the Defendants argue that, if there was a breach of contract, the breach occurred in California not in British Columbia by virtue of the fact that correspondence by the Defendants, by telephone or other electronic means, originated in California. The Plaintiff argues that since there was no anticipatory breach, the correspondence that took place between the parties does not form the basis of the breach. Rather, the failure to deliver the Shares to Pacific in British Columbia is the basis of the breach. In the alternative, since Pacific purportedly suffered damage in British Columbia, the breach should be taken to have occurred in British Columbia.

[16] While I agree with the Defendants that the transaction underlying this action might have taken place pursuant to

telephone or other electronic correspondence, I do not agree that this correspondence forms the basis of the breach. As pointed to by the Plaintiff, unlike in Rhodes, supra, this is not a case where an anticipatory breach occurred. The Defendants did not send the Plaintiff notice by telephone or otherwise to advise the Plaintiff that the agreement would not be fulfilled. Consequently, the Defendants cannot rely on correspondence originating in the United States as support for their argument that the breach occurred in the United States.

[17] This being said, I nevertheless find that the alleged breach of contract occurred outside of British Columbia. The alleged contract was for the transfer of shares from the Defendants to the Plaintiff. The fundamental breach then was the failure to effect the transfer. It has been held by this Court and the Court of Appeal that contracts of this nature do not give rise to jurisdiction since it is not necessary for the transfer of the shares to be effected in British Columbia: Oppenheimer v. Sperling (1899), 7 B.C.R. 96 (B.C.S.C.); Smith & Osberg Ltd. v. Hollenbeck, [1939] 2 W.W.R. 625 (B.C.C.A.). Richard Thomas, in his Affidavit sworn June 1, 1999, also suggested that 'south-bound" trades of the kind in issue are generally effected in the United States, not in British Columbia. So, notwithstanding that the Defendants had an obligation to "deliver" the shares to the Plaintiff in British Columbia, albeit electronically, the Defendants would satisfy their obligation by executing the transfer from the United States. The Plaintiff has not adduced any evidence to show that the Defendants had an obligation to effect the transfer in British Columbia.

[18] I am also not satisfied by the Plaintiff's argument that the breach should be taken to occur where the damage is sustained.

[19] Having found that the Plaintiff has not adduced sufficient evidence to show that the breach, if any, occurred in British Columbia, it was not open for the Plaintiff to take advantage of the provisions under Rule 13(1)(g).

[20] I now turn to the issue of whether the Supreme Court of British Columbia has jurisdiction over this proceeding by virtue of a real and substantial connection between the proceedings and British Columbia.

2. Does the Supreme Court of British Columbia have jurisdiction over this proceeding by virtue of a real and substantial connection between the proceeding and British Columbia?

[21] If the requirements of Rule 13(1)(g) are not satisfied, the court may still grant leave to serve a defendant out of the jurisdiction under Rule 13(3). Leave will be granted under Rule 13(3) only if there is a "real and substantial connection" (a term not yet fully defined) between British Columbia and the events giving rise to the proceeding: Morguard Investments Ltd. v. de Savoye (1991), 52 B.C.L.R. (2d) 160 (S.C.C.); Exta-Sea Charters Ltd. v. Formalog Ltd. (1991) 55 B.C.L.R. (2d) 197 (B.C.S.C.). Such a connection cannot be established by showing that the court is the forum conveniens; that issue can be raised by the defendant only if jurisdiction of the court has been established: Exta-Seas, supra.

[22] The decision of Master Horn in Exta-Seas provides a very good review of the authorities and a summary of the law to be applied in these matters. At p. 204, Master Horn set out the criteria to be met in the real and substantial connection test:

What then emerges from the rules is that to invoke the discretion of the court under R. 13(3) to order service upon a defendant not in the province, there must be a connection between:
(a) the defendant and British Columbia; or
(b) the cause of action and British Columbia; or
(c) the thing being litigated over and British Columbia; or
(d) a person and British Columbia where the status of that person is the issue.

[23] On the facts of this case, the only criterion that might be applicable is (b) the cause of action and British Columbia.

The Defendants argue that there is not a real and substantial connection between the cause of action and British Columbia. In support of their position, the Defendants rely on the decisions in Turbide v. Orrell, [1998] B.C.J. No. 1343 (Q.L.) (B.C.S.C.) and Sequin-Chand, [1992] B.C.J. No. 237 (Q.L.) (B.C.S.C.) for the proposition that the suffering of damages in British Columbia is not sufficient to establish a connection. In Sequin-Chand, supra, the court found that a connection cannot be established with respect to a motor vehicle accident in Washington State where the only link between the action and British Columbia is that the effects of injuries caused by the accident continue to be experienced in British Columbia. In Turbide, supra, the fact that the plaintiff only discovered, after he moved to British Columbia, that before leaving Nova Scotia he had been injured by the alleged negligence of a doctor in Nova Scotia did not satisfy the requirement that there be a real and substantial connection between the cause of action and British Columbia.

[24] The Defendants submit that an analogy should be drawn between Turbide, supra and Sequin-Chand, supra and the case at bar. Namely that, if a breach of contract occurred, it occurred outside of British Columbia. Therefore, the fact that Pacific may sustain damage in British Columbia should not be sufficient to establish a real and substantial connection between the cause of action and British Columbia.

[25] I cannot agree with the Defendants' submission that the connection between the cause of action and British Columbia is as tenuous as the cases cited by the Defendants. This is not a case where the only connection is the fact that the Plaintiff, though injured elsewhere, experienced a continuation of those injuries in British Columbia. On the contrary, there is evidence, which I outline below, that supports a finding of a real and substantial connection between the facts giving rise to this action and British Columbia.

[26] The Plaintiff carries on business in British Columbia. The transaction which forms the basis of this litigation arose during the course of the Plaintiff's business in British Columbia. Pursuant to communication initiated by the Plaintiff, a share purchase agreement was allegedly entered into by the Plaintiff and the Defendants. When the Defendants allegedly failed to deliver the shares pursuant to the agreement, the Plaintiff, in accordance with standard practice, issued buy-in notices dated March 23, 1998 and April 9, 1998 to the Defendant PaineWebber. The buy-in notices originated in British Columbia. The Plaintiff effected the buy-in of the shares for the account of Drake, and in so doing, allegedly suffered a loss of $12,960.00 USD. The Plaintiff suffered the damages in British Columbia.

[27] On the basis of these facts, I am satisfied that a real and substantial connection exists between the cause of action and British Columbia such that this Court has sufficient interest to hear the matter at hand.

[28] I now turn to the issue of forum conveniens.

3. If the Supreme Court of British Columbia does have jurisdiction over this proceeding, should it decline jurisdiction on the principle of forum conveniens?

[29] Having decided that this Court does have jurisdiction over this matter, I must now turn my mind to whether this Court should or should not decline that jurisdiction. In order for displace the forum selected by the Plaintiff, the existence of a more appropriate forum must clearly be established: Anchem Products Inc. v. British Columbia (Workers Compensation Board) (1973), 77 B.C.L.R. (2d) 62 (S.C.C.). To assist in this exercise, a non-exhaustive list of factors for consideration was compiled by Low J. in Stern v. Dove Audio Inc. (15 April 1994), Vancouver Registry C930935 (B.C.S.C.) and cited in Leisure Time Distributors Ltd. v. Calzaturificio S.C.A.R.P.A. - S.P.A. (1996), 5 C.P.C. (4th) 320 at 334:

(1) Where each party resides.
(2) Where each party carries on business.
(3) Where the cause of action arose.
(4) Where the loss or damage occurred.
(5) Any juridical advantage to the plaintiff in this jurisdiction.

(6) Any juridical disadvantage to the defendant in this jurisdiction.
(7) Convenience or inconvenience to potential witness.
(8) Cost of conducting the litigation in this jurisdiction.
(9) Applicable substantive law.
(10) Difficulty . . . in proving foreign law, if necessary.
(11) Whether there are parallel proceedings in any other jurisdiction.

[30] The Defendants argue that the Court ought to decline jurisdiction on the basis that three of the four parties to the litigation are in the United States; the Defendants did not initiate the contract with the Plaintiff; all of the Defendants' witnesses are in the United States; and the claim by the Plaintiff is in U.S. dollars and the Statement of Claim acknowledges at paragraph 7 that the policies and practices of the U.S.-based NASD apply to this transaction. Several U.S. rules, regulations and laws purportedly apply.

[31] Upon a review of the facts in this case, I am not satisfied that the United States is clearly a more appropriate forum than British Columbia for the case at bar to be heard. First, the Plaintiff is incorporated and carries on business in British Columbia. Second, the Plaintiff suffered damage in British Columbia. Third, inconvenience to potential witnesses for the Defendants will be minimal since the matter may be heard by way of summary trial with evidence given by way of affidavit. Fourth, cost of conducting the litigation in this jurisdiction will be kept to a minimum since the matter may be heard by way of summary trial. Finally, if United States securities law is applicable, I am not convinced that its interpretation and applicability by this Court will be a bar to a fair trial in this jurisdiction.

[32] In conclusion, I am not prepared to give effect to the doctrine of forum non conveniens. The Defendants have not established that there is clearly a more convenient or appropriate forum in the United States.

[33] In the result, leave is granted to the Plaintiff to serve the Writ of Summons and Statement of Claim ex juris on the Defendants pursuant to Rule 13(3) of the Rules of Court.

[34] There will also be an order for costs in favour of the Plaintiff. Costs would be under scale 3.

"S.R. Romilly, J."

Mr. Justice Romilly