Citation: *Pacific International Securities Inc. v. Drake Capital Securities Inc.* 2000 BCCA 632

Date: 20001123
Docket: CA026442
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

PACIFIC INTERNATIONAL SECURITIES INC.

PLAINTIFF
(RESPONDENT)
(APPELLANT BY CROSS-APPEAL)

AND:

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

DEFENDANTS
(APPELLANTS)
(RESPONDENTS BY CROSS-APPEAL)

Before: The Honourable Mr. Justice Esson
The Honourable Mr. Justice Mackenzie
The Honourable Madam Justice Proudfoot

Timothy J. Delaney — Counsel for the Defendants/Appellants

Edward G. Wong — Counsel for the Plaintiff/Respondent

Place and Date of Hearing: Vancouver, British Columbia
November 6, 2000

Place and Date of Judgment: Vancouver, British Columbia
November 23, 2000

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurred in by:
The Honourable Madam Justice Proudfoot

Dissenting Reasons by:
The Honourable Mr. Justice Esson (Page 15, Paragraph 28)

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

Introduction

[1] This appeal raises issues of *jurisdiction simpliciter* and *forum conveniens* with respect a writ served *ex juris* on foreign defendants for breach of a share purchase contract.

[2] The plaintiff/respondent Pacific International Securities Inc. ("Pacific") served the writ on the appellants in the United States without leave. The writ was endorsed for service outside of British Columbia pursuant to Rule 13(1)(g) of the British Columbia Rules of Court in respect of a breach of contract committed in British Columbia. The chambers judge concluded that Rule 13(1)(g) could not support service *ex juris* because the alleged breach of contract occurred in California and not in British Columbia. However, he upheld service of the writ under Rule 13(3) on the ground that there was a real and substantial connection between the cause of action and British Columbia. He also concluded that jurisdiction should not be declined on grounds of *forum non conveniens*.

[3] In this Court, Pacific relied solely on Rule 13(3) to support *ex juris* service. Counsel conceded that the breach of contract did not occur in British Columbia and *jurisdiction simpliciter* could not be supported under Rule 13(1)(g).

[4] The defendants/appellants contend that the proceedings do not meet the "real and substantial connection" test required for *jurisdiction simpliciter* under Rule 13(3) and that the chambers judge erred in applying the test for *forum conveniens*.

Facts

[5] Pacific is a British Columbia securities dealer. Its claim is for damages for breach of a share purchase contract made by telephone and confirmed by an exchange of faxed messages. The purchase was made by Pacific to fill a client purchase order.

[6] The contract was for 2,400 shares of *Shopping.com* at a price of $28.35 ($U.S.) per share or a total price of $68,040 ($U.S.), for settlement on 23 March 1998. Shares of *Shopping.com* are listed on the National Association of Securities Dealers ("NASD") Bulletin Board, an over-the-counter market. The appellant Drake Capital Securities Inc. ("Drake") is said to be the "market maker" of the shares of *Shopping.com* and to have advertised the availability of *Shopping.com* shares through a notice posted on its internet bulletin board.

[7] The transaction in issue was effected by telephone between a Pacific employee in Vancouver and a Drake employee in California. It was confirmed by faxed messages between Pacific in Vancouver and PaineWebber Inc., as agent for Drake, in Weehawken, New Jersey. The Drake "market-maker" website that advertised the availability of *Shopping.com* shares is said to be physically located in Colorado. None of the appellants have an office or other physical presence in British Columbia or elsewhere in Canada.

[8] The "delivery" of the shares would have been effected through accounts at the Canadian Depository for Securities ("CDS")and the U.S. Depository Trust Company ("DTC"). CDS is located in Toronto and DTC in the United States. Normally delivery would be effected electronically by reciprocal entries in the accounts of the two trust companies, crediting the shares as delivered in the segregated account of Pacific at the CDS and debiting the corresponding Drake account at DTC. It would be only in a rare instance that a share certificate would physically be delivered or issued in the name of Pacific or its client.

[9] Pacific notified the appellants, by a faxed "buy in notice", that if the shares were not delivered by a specified date substitute shares would be bought for the appellants' account. The appellants' requested and were given an extension to 8 April 1998. The shares remained undelivered. Pacific alleges that it was directed by its regulatory authority to purchase or borrow shares to cover its short position with its client. Pacific then purchased 2,400 shares in the market at a cost of $81,000 ($U.S.) to fulfil the obligation to the client. Pacific claims the difference in cost, $12,960 ($U.S.).

Jurisdiction Simpliciter under Rule 13(3)

[10] The issue before us is whether the chambers judge was correct in finding *jurisdiction simpliciter* under Rule 13(3). The three defendants are jointly represented and assert a common position on this appeal. They are all foreign corporations served *ex juris*.

[11] Rule 13(3) is brief. It reads:

> 13(3) In any case not provided for in subrule (1), the court may grant leave to serve an originating process or other document outside British Columbia.

[12] It is settled law that Rule 13(3) incorporates by necessary implication the real and substantial connection test for jurisdiction; see ***Cook v. Parcel, Mauro, Hulton & Spaanstra, P.C.*** (1997), 31 B.C.L.R. (3d) 24 (B.C.C.A.). However, as La Forest J. noted in ***Tolofson v. Jensen***, [1994] 3 S.C.R. 1022 the term "real and substantial connection" has not been fully defined. In ***Cook***, a claim for declaratory relief against a Colorado law firm failed the test of connection to British Columbia. Any declaration would have required an injunction from a Colorado court to give it efficacy. The substance of the claim involved the legal and ethical duties of Colorado lawyers in Colorado, a matter quintessentially within the purview of the Colorado courts and lacking any substantial connection to British Columbia.

[13] The appellants rely on the decision of this court in ***Canadian International Marketing Distributing Inc. v. Nitsuko et al.*** (1991), 56 B.C.L.R. (2d) 130 (C.A.). The case involved a contract with a Japanese company for the supply of telecommunications equipment f.o.b. Japan. The contract allegedly was breached when the defendant failed to supply the equipment. This Court held that the British Columbia court had no jurisdiction because the defendant did not have any presence in British Columbia and the cause of action arose outside of Canada on a contract to supply goods in Japan and governed by the law of Japan.

[14] Pacific submits that the real and substantial British Columbia connection in this case is the obligation imposed by B.C. regulatory authority to buy or borrow shares to meet its obligation to its client. It claims that the damage in the amount of the differential cost of the shares was sustained in compliance with the regulatory directive. It will raise that obligation in response to any defence of failure to mitigate. Thus Pacific contends that in this case, unlike ***Nitsuko***, the damage was suffered in British Columbia and in compliance with duties imposed

by British Columbia law.

[15] The connection of the damage sustained to jurisdiction is not a specific ground for asserting jurisdiction in Rule 13(1). The Ontario rule comparable to Rule 13(1) is Rule 25(1)(h) of the Ontario Rules of Practice which allows service *ex juris* "in respect of damage sustained in Ontario arising from a . . . breach of contract committed elsewhere." The Ontario rule implies that damage sustained within the jurisdiction arising from a breach of contract outside the jurisdiction meets the real and substantial connection test discussed in authorities such as ***De Savoye v. Morguard Investments Limited*** (1990), 52 B.C.L.R. (2d) 60 (S.C.C.) and ***Tolofson v. Jensen***, *supra*. Thus jurisdiction on that ground is consistent with the general principles of conflict of laws and inter-jurisdictional comity. Although unlike Ontario, damage sustained within the jurisdiction is not a specific ground for asserting jurisdiction in a breach of contract case under Rule 13(1), I see no reason why it cannot be relied upon as a real and substantial connection "in any other case" under Rule 13(3).

[16] Nitsuko involved a simple failure to deliver goods in Japan and there was no claim for damage sustained in British Columbia in any way comparable to Pacific's claim here. The only apparent ground for asserting jurisdiction in ***Nitsuko*** was the plaintiff's residence in the jurisdiction and that is not sufficient.

[17] Ell v. Con-Pro Industries Ltd., [1992] B.C.J. No. 513 (B.C.C.A.)(Q.L.), relied upon by the appellants, is the tort equivalent of the ***Nitsuko*** contract. In that case, the plaintiff's husband, a British Columbia resident, was killed in a motor vehicle accident in Ontario. It was held that the British Columbia court had no jurisdiction because the deceased's residence was the only connection to British Columbia. The cause of action arose in Ontario and the defendants had no connection to British Columbia. The damage that completed the cause of action, the fatality, occurred in Ontario and, as in ***Nitsuko*** the only connection with British Columbia was the plaintiff's residence. That alone is insufficient to establish jurisdiction.

[18] In my view, neither ***Nitsuko*** nor ***Ell*** precludes the British Columbia courts from taking *jurisdiction simpliciter* where the damages, either in contract or tort, are sustained in British Columbia.

[19] Pacific's statement of claim alleges that the appellants carry on business in British Columbia, although it is not alleged that they have any physical presence in the jurisdiction. Pacific's affidavit evidence asserts that both Drake and PaineWebber engage in the business of selling U.S. securities to Canadian dealers, referred to as "south-bound traffic" and buying Canadian securities for U.S. accounts, "north-bound traffic". Affidavits of officers of the appellants deny generally that the appellants carry on business in British Columbia.

[20] In ***Amchem Products Inc. v. British Columbia (Workers' Compensation Board)***, [1993] 1 S.C.R. 897, Sopinka J. commented at pp. 911-912:

> This Court has not considered this question [of the proper forum] since its decision in *Antares Shipping Corp. v. The Ship "Capricorn"*, [1977] 2 S.C.R. 422. Meanwhile, the business of litigation, like commerce itself, has become increasingly international. With the increase of free trade and the rapid growth of multi-national corporations it has become more difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. Moreover, there are frequently multiple defendants carrying on business in a number of jurisdictions and distributing their products or services world wide. As well, the plaintiffs may be a large class residing in different jurisdictions. It is often difficult to pinpoint the place where the transaction giving rise to the action took place. Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives. In some jurisdictions, novel principles requiring joinder of all who have participated in a field of commercial activity have been developed for determining how liability should be apportioned among defendants. In this climate, courts have had to become more tolerant of the systems of other countries. The parochial attitude exemplified by *Bushby v. Munday* (1821), 5 Madd. 297, 56 E.R. 908, at p. 308 and p. 913, that "[t]he substantial ends of justice would require that this Court should pursue its own better means of determining both the law and the fact of the case" is no longer appropriate.

These observations were made in the context of *forum conveniens* and anti-suit injunction issues but they reflect a reality that also bears on questions of *jurisdiction simpliciter*. Securities transactions involve intangible property effected by electronic means through various intermediaries in different physical locations. In the world of electronic commerce, physical locations can become almost incidental and other factors assume greater importance. I think it is at least arguable on the facts asserted by Pacific that the appellants can be said to carry on business in British Columbia but I do not think it is necessary to answer that question definitively for jurisdictional purposes in this case.

[21] Here the plaintiff claims that its damage was sustained in compliance with British Columbia regulatory obligations. It may be that the appellants will assert rules in other jurisdictions in defence of the claims. At this stage it cannot be determined whether there will be a conflict between the rules in different jurisdictions and, if so, which rules will govern. However, it is apparent that British Columbia rules will be engaged at least on questions of mitigation of

damages. In the context of this dispute I think that is a real and substantial connection of the cause of action to British Columbia.

[22] It follows that in my opinion the chambers judge was correct in his conclusion that the British Columbia court has *jurisdiction simpliciter* under Rule 13(3).

Forum non conveniens

[23] On the issue of *forum non conveniens* the chambers judge said at paragraphs 31 and 32:

> 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.
>
> 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.

[24] The appellants submit that the chambers judge erred in two respects in reaching his conclusion. First, it was argued that the chambers judge placed too high an onus on the appellants in requiring them to satisfy him that an United States jurisdiction, specifically California, was "clearly" a more appropriate or convenient forum. Relying on ***Amchem***, *supra*, the appellants contend that once the appellants had established that California was an appropriate forum, the onus shifted to Pacific to show that justice requires that the trial take place in British Columbia. In my opinion, ***Amchem*** does not stand for such a broad proposition. ***Amchem*** involved an anti-suit injunction where the foreign court, in Texas, had assumed jurisdiction in accordance with accepted jurisdictional principles. The issue was whether the British Columbia plaintiff should be restrained from pursuing the Texas action. The plaintiff had chosen the Texas forum. Here the plaintiff has chosen the British Columbia forum and there are no competing proceedings in any other jurisdiction. In these circumstances I do not think that the chambers judge erred in allowing Pacific its choice of forum given that another forum was not more convenient.

[25] The appellants also submit that the emphasis placed by the chambers judge on the summary trial procedure available in British Columbia implied that no similar procedure was available in California. I do not take that implication from those comments. Rather, I think the trial judge simply emphasized that the availability of a summary trial with evidence on affidavit would be less expensive for the appellants than a trial that would require the presence of witnesses. Inasmuch as there do not appear to be issues of credibility, a summary trial would be advantageous to all parties, particularly having regard to the relatively low amount of damages claimed. I assume that California does have a summary trial equivalent of British Columbia Rule 18A and that there is no significant difference between the jurisdictions in that respect. While the availability of a summary trial may not be a procedural advantage of British Columbia over California, it does reduce the cost and inconvenience to the appellants of litigating in British Columbia compared to a trial with witnesses. I take that to be the thrust of the chambers judge's comments and as such I think it was a factor he was entitled to consider in exercising his discretion as to the convenient forum.

[26] In my opinion, there is no reversible error in the conclusion of the chambers judge on *forum non conveniens*.

[27] I would dismiss the appeal.

"The Honourable Mr. Justice Mackenzie"

I AGREE:

"The Honourable Madam Justice Proudfoot"

Reasons for Judgment of the Honourable Mr. Justice Esson:

[28] I have read the draft reasons of Mr. Justice Mackenzie. I regret that I cannot agree with his conclusion that the appeal should be dismissed.

[29] The most significant finding of the chambers judge was that the alleged breach of contract occurred in California and not in British Columbia. On the basis of that finding, he correctly held that the service *ex juris* of the writ of summons was invalid. The first issue on appeal is whether his finding that service of the writ could be upheld under Rule 13(3) on the ground that there is real and substantial connection between the cause of action and British Columbia can be upheld. In my view, it cannot and it is therefore not necessary to consider the question of *forum non conveniens*.

[30] Counsel for the plaintiff does not dispute the correctness of the finding by the learned chambers judge that the alleged breach of contract occurred in California. It is of some importance that the decisions which require that conclusion, going back over more than a century, deal with a fact pattern which cannot be distinguished on any ground other than that technological changes have resulted in transactions of the kind involved here being dealt with in a manner which is mechanically different from that which prevailed at the time those cases were decided.

[31] The earliest such authority is ***Oppenheimer v. Sperling*** (1899), 7 B.C.R. 96 (S.C.) a decision of Irving J. ruling that an *ex juris* writ which was issued in an action to enforce an agreement between residents of British Columbia and England for transfer of shares to a British Columbia company was a contract to be enforced in England. As Irving J. said at p.99:

> The plaintiffs seek to enforce a contract to transfer shares in a British Columbia Company. The defendant would satisfy their demand by executing the deed in England, or anywhere else. There is nothing to be performed under the contract in British Columbia either in respect of the transfer of the shares or of the defendants' holding the other shares in trust.

[32] A similar fact pattern was dealt with by this court in ***Smith and Osberg Ltd. v. Hollenbeck*** (1939), 54 B.C.R. 141, [1939] 2 W.W.R. 625 (C.A.). In that case the plaintiff, a British Columbia corporation carrying on business in this province, sued for specific performance of a contract with the intended defendant to deliver all of the issued shares of another British Columbia company which carried on business in this province. The intended defendant was an American citizen residing and having a business office in Oregon. This court held that an order granting leave to effect service *ex juris* should be reversed. The majority judgment is that of Sloan J.A. (later C.J.B.C.) who said at p. 633 (W.W.R.):

> The narrow question is whether the contract sued upon is one which "ought to be performed within the jurisdiction." In the absence of authority "ought" might import considerations of the widest kind but this Rule is of a considerable age and happily this word "ought" in it has not escaped comment.

After referring to the decision of Collins M.R. in ***Mutzenbecher v. La Aseguradora Espanola***, [1906] 1 K.B. 254 at 260, 75 L.J.K.B. 172 holding that "... it must be shown that the contract on the part of the person who issued must be one to be performed within the jurisdiction." Sloan J.A. went on to say at p.634 (W.W.R.):

> Applying then that test to this case I am satisfied that, in so far as the sale of the shares is concerned, the defendant's only contractual obligation is to execute and deliver proper forms of transfer together with the requisite share certificates. He is not obligated to effect registration-***Castleman v. Waghorn, Gwynn & Co***. (1908) 41 S.C.R. 88; ***Skinner v. London Marine Insur. Corpn***. (1885) 14 Q.B.D. 882, 54 L.J.Q.B. 437; ***Oppenheimer v. Sperling*** (1899) 7 B.C.R. 96, at 99; ***Tangney v. Clarence Hotels Co.*** [1933] Ir. R. 51, at 59-nor for that matter to prepare the transfer forms. It is the duty of the transferee to prepare the necessary forms and to present them to the transferor for signature: ***Birkett v. Cowper-Coles*** (1919) 35 T.L.R. 298.
>
> It is clear to me that the said obligation of the defendant is not one which *must* be performed within the jurisdiction.

[33] The case which is primarily relied on by the appellant is ***Canadian International Marketing Distributing Limited v. Nitsuko Ltd. et al*** (1990), 56 B.C.L.R. (2d) 130 (C.A.). That case arose from a different fact pattern from that in ***Oppenheimer v. Sperling*** and ***Smith and Osberg v. Hollenbeck*** but is based on the same principle. The plaintiff, a British Columbia Company, entered into a contract with the defendants, which were Japanese corporations, for the supply of a telephone switching system to be delivered f.o.b. Japan. The defendants applied under Rule 14(6) for a declaration that the British Columbia courts had no jurisdiction or should decline jurisdiction. The chambers judge dismissed that application. In reversing his decision, Gibbs J.A. for the court said at p.132:

> If the chambers judge had kept the two concepts of jurisdiction simpliciter and forum conveniens separate, and followed the sequence of considering jurisdiction first, he would, I think, have disposed of the applications differently. On the facts the only connection between this case and the Province of British Columbia is that the plaintiff is a resident here, and that is not enough. The defendants are not residents. They are residents of Japan. They neither carry on business in Canada or have assets in Canada or have officers, employees or agents in Canada. In short, they have no presence here. Furthermore, the alleged cause of action arose outside of Canada. It arose on an alleged breach of a contract to deliver goods f.o.b. Japan, a contract moreover which appears to have incorporated the law of Japan to govern the contractual relationship.

[34] I see no material distinction between this case and the factual matters relied on by Gibbs J.A. in concluding that the courts of this province had no jurisdiction. In this case the defendants are not residents of Canada. They are residents of the United States. They do not carry on business in Canada. They do not have assets in Canada. They have no officers, employees or agents in Canada. In short, they have no presence here and clearly the alleged cause of action arose outside Canada. Counsel for the respondent seeks to distinguish this case from ***Nitsuko*** on the basis that these defendants have on other occasions entered into similar contracts to deliver shares to brokers in British Columbia. That, in my view, does not affect the principle.

[35] The grounds upon which the chambers judge found a real and substantial connection between the cause of action and British Columbia were stated by him thus:

> [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.
>
> [1] 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.

[36] Most of the facts listed in para. 26 are indistinguishable from the facts in ***Oppenheimer***, ***Smith and Osberg*** and ***Nitsuko***. It is inevitable, where the purchaser carries on business in British Columbia, that it will have taken steps in relation to the contract in this province. The only additional matter mentioned by the chambers judge is that the plaintiff suffered damages in British Columbia. I see no significance in that. With respect, that flows inevitably from the fact that the purpose of the contract from the point of view of the plaintiff was to have the benefit in this province of whatever goods it was purchasing.

[37] My colleague relies, as I understand his analysis, on the matter of damages being sustained in this province and the additional factor of British Columbia regulations perhaps having some impact on the issues between the parties. With respect, I do not see that as a distinguishing feature. We live in an era of intense regulation and, as my colleague says, California regulatory bodies may also be involved.

[38] It is my view that, as a matter of policy, our courts should not be astute to find jurisdiction on the basis of minor factual distinctions. Most of these issues arise in a commercial context. In that context, consistency is all important. Plaintiffs should not be encouraged to elevate minor differences in fact patterns into grounds for distinguishing a settled line of authority.

[39] In my view, that is the effect of the decision under appeal. I would allow the appeal.

"THE HONOURABLE MR. JUSTICE ESSON"