Citation: Vanderpol v. Aspen
2002 BCSC 518

Date: 20020410
Docket: No. S061970
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THEODORE J. VANDERPOL

PLAINTIFF

AND:

ASPEN TRAILER COMPANY LTD.
ASPEN TRAILER COMPANY (ALBERTA) LTD.
ASPEN TRAILER INC.

DEFENDANTS

REASONS FOR JUDGMENT
OF THE
HONOURABLE MADAM JUSTICE ALLAN
IN CHAMBERS

Counsel for the plaintiff:	Margaret C. Hollis
Counsel for the defendant Aspen Trailer Inc.	Charles B. Coutts
Counsel for the defendants Aspen Trailer Company Ltd. and Aspen Trailer Company (Alta.) Ltd.	Timothy J. Delaney
Date and Place of Hearing:	March 13 and 14, 2002 Vancouver, B.C.

[1] Mr. Vanderpol, the plaintiff, was employed in British Columbia by Aspen Trailer Company Ltd. ("Aspen B.C.") from January 1996 to June 1999. He was then transferred to Georgia, where he was employed by Aspen Trailer Inc. ("Aspen Inc.") until July 2000. He brings this action for damages arising out of the defendants' alleged breach of his employment contract.

[2] There are two motions before me. Aspen Inc. seeks a declaration that this Court decline jurisdiction on the basis that the Court has no jurisdiction or, alternatively, because B.C. is not the *forum conveniens.* The plaintiff opposes that application and applies for a declaration pursuant to Rule 18A that, at all material times, the defendants carried on business as a common enterprise and, as a result, any liability to the plaintiff is joint and several.

[3] At the hearing of the applications, the plaintiff was given leave to amend his statement of claim pursuant to Rule 24(1) to properly reflect the corporate names of the defendants. The plaintiff's application to amend the pleadings by adding a further defendant, Wizard Enterprises Ltd., was withdrawn. It was agreed that the plaintiff's application for holiday pay owing would be determined at the trial of the remaining issues.

The Background

[4] Numerous factual issues arise on the affidavit material before me. They include the reasons why, and the circumstances under which, the plaintiff was transferred to Georgia; whether the transfer was intended to be temporary or permanent; the circumstances of the plaintiff's termination and whether he refused employment in Litchfield.

[5] Those factual disputes cannot be resolved on the basis of affidavit material and I make no attempt to do so. Any findings of fact made for the purpose of determining these applications are based on the material at hand and are not binding on another judge in subsequent proceedings.

[6] I believe that the following facts are not disputed. The plaintiff was employed by Aspen

B.C. as Regional Sales Manager from January 1996 until June 1999. At that time he and his family moved to Atlanta, Georgia, where he became employed by Aspen Inc. He was paid by Aspen B.C. until September 1999, at which time he was paid by Aspen Inc.

[7] Aspen Inc.'s Georgia office was not successful and in early May 2000, Mr. Murray Johnston, the president of all three defendants, decided to close it effective June 20, 2000.

[8] The plaintiff was given an offer to relocate to Litchfield. Whether or not he refused that offer is in dispute. The plaintiff's employment was terminated by letter dated June 20, 2000, effective July 4, 2000. He and his family have remained in Georgia.

[9] Aspen Inc. is incorporated in Minnesota, U.S. and has a manufacturing plant in Litchfield, Minnesota. Aspen Trailer Company (Alberta) Ltd. ("Aspen Alberta") is incorporated in Alberta and has a manufacturing plant in Nisku, Alberta. Neither Aspen Inc. nor Aspen Alberta are extra-provincially registered in B.C. Aspen B.C. is incorporated in B.C. and has a manufacturing plant in Surrey and a sales office in Prince George. It is not extra-provincially registered outside B.C. The Aspen companies (collectively, the "Aspen Trailer Group") manufacture and sell custom-built heavy-haul equipment trailers.

[10] While the defendants are separate corporate entities, the plaintiff submits that the documentation and the examination for discovery of Murray Johnston clearly establish that the three defendant companies comprise a common enterprise that can be categorized as the Aspen Trailer Group. The plaintiff relies on the following evidence in support of that conclusion:

- the three companies are controlled by Murray and Naidra Johnston;
- Murray Johnston is the president and CEO of all three operating companies;
- the senior manager's group is common to all three operating companies;
- the designation "Aspen Trailer Group" is used for the purposes of advertising, correspondence, invoicing, etc. Those documents either contain no address, the Richmond B.C. address, or on occasion either the Litchfield or another address;
- personnel, including Mr. and Mrs. Johnston, transfer from company to company within the Aspen Trailer Group;
- the Aspen Trailer Group has had a common corporate or centralized office in Richmond, B.C.; over the last year, the central corporate office has moved to Nisku, Alberta;
- the three operating companies have a common sales strategy business plan;
- the Aspen Trailer Group has a common website, showing its corporate office in Richmond and advertising the fact that it has three manufacturing facilities (in B.C., Alberta, and Minnesota);
- the quoting, manufacturing, and invoicing of a single trailer may involve two or all of the operating companies;
- the director of manufacturing for the Aspen Trailer Group decides which facility will build which trailer, depending on the manpower available;
- formerly, there was a separate engineering entity at each of the three Aspen locations. Today there is "one virtual engineering entity" housed in two locations, Richmond and Nisku, sharing one server in Nisku; and
- Aspen B.C. is closing down its operations and it is anticipated that process will be completed by September 2002, several months prior to the tentative trial date of January 2003.

[11] There is no question that the plaintiff was employed by Aspen B.C. from January 1996 to August 1999 and by Aspen Inc. from September 1999 to June 2000. Although he was paid by Aspen B.C. for the first three months after his transfer to the U.S., he was then transferred to Aspen Inc.'s payroll, paid American benefits and income tax, and became subject to Aspen Inc.'s pay and commission plan.

[12] However, there are additional factors that indicate a continuing relationship between the plaintiff and all of the defendant companies:

- the plaintiff's "revised remuneration package" effective July 1, 1997 was with the "Aspen Trailer Group";

- "the deal" regarding the plaintiff's relocation was described in a fax on Aspen Trailer Group letterhead dated May 23, 1999. Numerous references are made to "the Company" arranging a visa, paying moving and living expenses, etc. without reference to a particular company;

- both before and after the transfer, the plaintiff sold trailers for all three operating companies. He was paid his base salary by the company he worked for, but was paid commissions by the company that built the trailer that was sold; and

- the accounting for Aspen Trailer Group is presently performed in Nisku, Alberta. The plaintiff's W2 form (the U.S. equivalent of a T4 slip) reporting his income from Aspen Inc. was prepared at and sent from Nisku.

The application of Aspen Inc.

[13] Aspen Inc. seeks a declaration that the Court decline jurisdiction over it pursuant to Rule 14(6)(c) That Rule provides:

> 14(6) Where a person served with an originating process has not entered an appearance and alleges that
>
> ...
>
> (c) the court has no jurisdiction over him in the proceeding or should decline jurisdiction,
>
> the person may apply to the court for a declaration to that effect.

[14] Mr. Coutts, counsel for Aspen Inc., submits that the Court does not have jurisdiction *simpliciter* or, alternatively, B.C. is a *forum non conveniens.*

Does this Court have jurisdiction simpliciter?

[15] In this case, the writ was served on Aspen Inc. without the endorsement required by Rule 13(2). Rule 13(3) provides that the Court may grant leave to serve *ex juris* if none of the provisions stipulated in Rule 13(1) apply. Ms. Hollis, counsel for the plaintiff, says that the applicable provision permitting service outside of B.C. without leave is Rule 13(1)(j), which provides that leave is not required if "a person outside British Columbia is a necessary or proper party to a proceeding properly brought against some other person duly served in British Columbia."

[16] When determining jurisdiction *simpliciter,* the onus is on the plaintiff to establish a real and substantial connection with this Court and either the defendant or the subject matter of the litigation. When determining *forum conveniens*, the onus shifts to the defendant to show a more appropriate forum elsewhere.

[17] Mr. Coutts submits that the plaintiff cannot establish a real and substantial connection to British Columbia, which is required to establish jurisdiction *simpliciter,* for the following reasons:

> a) Aspen Inc. carries on business in Minnesota and, at the relevant time, carried on business in Georgia, not British Columbia;
>
> b) the plaintiff presently lives in Georgia, not British Columbia;
>
> c) the plaintiff's employment was terminated while he was in Georgia, not British Columbia;
>
> d) the employment contract was to be performed primarily in Georgia, as well as neighbouring American States, not British Columbia; and
>
> e) the real subject matter of this litigation concerns the plaintiff's employment as a U.S.A. salesman, the performance of his duties in Georgia, and his failure to mitigate his damages by obtaining other employment in Georgia or accepting a transfer to Litchfield, Minnesota.

[18] Mr. Coutts submits that only two factors connect the plaintiff's lawsuit to British Columbia: (1) the residency of his former employer, Aspen B.C. and (2) the fact that the

negotiations for his employment contract with Aspen Inc. occurred in B.C. He submits that those factors should be given little weight; the legal issues in dispute concern the plaintiff's employment performance and the termination of his contract in Georgia.

[19] Mr. Coutts concedes that the plaintiff's contract was terminated as a result of a decision made by a person who was physically in B.C. However, he submits that any breach of contract arose not from the termination of the contract, but from the alleged failure to provide the plaintiff with notice or pay in lieu of notice. He says that such notice or payment would have been made to the plaintiff in Georgia. Further, Aspen Inc. is neither resident nor physically present in B.C., and has no assets here.

[20] I agree that unless the plaintiff successfully establishes that the Aspen Trailer Group can be characterized as a common enterprise, there is no real and substantial connection between Aspen Inc. and B.C.

Do the defendants constitute a common employer?

[21] Ms. Hollis does not disagree with Mr. Coutts' articulation of the applicable law relating to jurisdiction *simpliciter.* However, she submits that the "real and substantial connection" of this matter to B.C. arises from the fact that the three defendant companies carry on business as a common enterprise.

[22] I have already reviewed a number of the relevant facts regarding the intercorporate relationship between the defendant companies that collectively form the Aspen Trailer Group and the plaintiff's involvement in that relationship. I turn to the relevant law.

[23] One of the earliest Canadian cases raising the doctrine of a "common employer" was ***Sinclair v. Dover Engineering Services Ltd.*** (1987), 11 B.C.L.R. (2d) 176 (S.C.), aff'd (1988), 49 D.L.R. (4th) 297 (B.C.C.A.). There, the plaintiff, a professional engineer, brought an action for wrongful dismissal. The primary issue was the identity of his employer. He was held out to the public as an employee of Dover Engineering Services Ltd. ("Dover") and provided engineering services in that name. However, he was paid by Cyril Management Limited ("Cyril"), a management company that also deducted and remitted income tax, U.I.C. and C.P.P. payments as his employer. Dover, the company that "hired" the plaintiff, had no assets.

[24] Mr. Justice Wood noted that there was an intricate corporate interrelationship between Dover and Cyril, although he did not consider that fact to be sinister nor irregular. The defendants argued that an employee could only contract for employment with a single employer. However, Wood J. saw no reason "why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship" (p. 181). There was no reason in fact or in law why both defendants should not be regarded jointly as the plaintiff's employer. He observed at p. 181 that "the old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations." He stated at p. 181:

> As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.

[25] Wood J. considered that it was necessary to lift the corporate veil to demonstrate the corporate interrelationship; it was appropriate to do so where to refuse to do so would operate to the plaintiff's detriment in seeking proper redress. The two defendants were held jointly and severally liable for any damages proven by the plaintiff.

[26] The Court of Appeal upheld the trial decision but, as counsel for the defendants note, they did not fully endorse the reasoning employed by Wood J. Wallace J.A. viewed the issue as one of determining which company or companies entered into a contract of employment with the plaintiff pursuant to which he would provide services in return for his salary and benefits. He suggested that it was not necessary to lift the corporate veil. He stated at p. 299:

> It must be kept in mind that one may be employed by a number of companies at different times for different purposes, or even at the same time. That is a matter of agreement reached between the employee and his respective employers and as long as they are aware of the employee's various activities or roles it is a matter with respect to which the parties can reach what they consider the most commercially convenient

> arrangement.

[27] The Court concluded that the facts in that case supported the inference that the plaintiff was employed under a contract of services with both defendants, both of which exercised control over him. Wallace J.A. concluded at p. 301:

> This arrangement, with which [the plaintiff] acquiesced, was devised because of the various beneficial aspects to the employer companies. They cannot, in my opinion, now deny its existence or the responsibility which it imposes upon them respecting their employee and the notice to which he is entitled upon dismissal.

[28] In ***Downtown Eatery (1993) Ltd. v. Ontario*** (2001), 54 O.R. (3d) 161, the Ontario Court of Appeal endorsed and applied the reasoning of Wood J. in ***Sinclair.*** Counsel for the defendants suggest that the Court erroneously relied on the trial decision rather than that of the Court of Appeal. However, I do not agree that the Court of Appeal in ***Sinclair*** disapproved of the doctrine articulated by Wood J. Rather, they found it unnecessary to lift the corporate veil. The facts of that case clearly established that both Dover and Cyril were Sinclair's employers.

[29] In ***Downtown Eatery***, some 13 years later, the Ontario Court of Appeal recognized the fact that the doctrine of common employer as articulated in ***Sinclair*** has been applied and expanded in numerous decisions in Canada. The Court noted that the common employer doctrine "has a well-recognized statutory pedigree in most jurisdictions." In Ontario, the ***Employment Standards Act*** deems associated or related businesses to be "one employer" for the purpose of protecting the benefits to which employees are entitled under that Act. In B.C., the ***Employment Standards Act***, R.S.B.C. 1996, c. 113, s. 95 deals with associated corporations for the purpose of enforcement of unpaid wages:

> **95** If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
>
> (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and
>
> (b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

[30] In my opinion, the development of the common employer doctrine in the common law tracks the statutory recognition that an employee may have more than one employer in a complex corporate interrelationship. As the Court stated at para. 36 in ***Downtown Eatery***:

> [A]lthough an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. At the end of the day, Alouche's situation is a simple, common and important one - he is a man who had a job, with a salary, benefits and duties. He was fired - wrongfully. His employer must meet its legal responsibility to compensate him for its unlawful conduct. The definition of "employer" in this simple and common scenario should be one that recognizes the complexity of modern corporate structures, but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees.

[31] There, the Court found that the plaintiff's true employer was a consortium of companies controlled by two individuals involved in the operations of a night club in which the plaintiff worked. The Court reached this conclusion despite the fact that the plaintiff did not contract directly with all of the constituent companies or hold himself out as an employee of the consortium.

[32] Both counsel for the defendants submit that the facts in this case fall within the ambit of ***Waddell v. Cintas Corp.***, [1999] B.C.J. No. 2404 (Q.L.) (S.C.). In that case, the trial judge rejected an assertion of dual employment. An appeal was allowed, but that specific finding was upheld: (2001), 96 B.C.L.R. (3d) 366; 2001 BCCA 717. That case raised the issue of liability as between subsidiary and parent companies, and is otherwise factually distinguishable. Clearly each fact pattern must be closely examined to determine whether an employment relationship was established between a plaintiff and more than one employer.

[33] In this case, the corporate interrelationship between the defendants and the plaintiff's relationship with all of them compel the conclusion that the Aspen Trailer Group and its constituent companies constitute the plaintiff's common employer for purposes of this litigation. That conclusion does not, however, determine the issues of the appropriate forum for this litigation or the applicable law of wrongful dismissal. The latter issue is one to be left to the

trial judge.

[34] The Court must be cautious when deciding some but not all of the issues on a Rule 18A application. All of the cases I considered relating to the "common employer" issue decided that issue at the conclusion of a trial. In this case, it is necessary to decide that issue at the outset because it is inextricably tied to the preliminary determination of the appropriate forum.

[35] Given my finding that the defendant companies constitute a common employer, there is no question that there is a "real and substantial connection" between B.C. and the plaintiff's action. The remaining issue is whether B.C. is the *forum conveniens.*

Is B.C. the forum conveniens?

[36] In ***Amchem Products Inc. v. British Columbia (Workers' Compensation Board)***, [1993] 1 S.C.R. 897, the Supreme Court of Canada held that *forum non conveniens* is the applicable rule to determine whether a court has jurisdiction over a matter. Mr. Justice Sopinka, for the Court, held that the identification of the *forum conveniens* was based on a consideration of all of the relevant factors connecting the litigation and the parties to the appropriate forum.

[37] The relevant factors, discussed in ***Amchem, 472900 B.C. Ltd. v. Thrifty Canada Ltd.*** (1998), 168 D.L.R. (4th) 602 (B.C.C.A.) and ***Westec Aerospace Inc. v. Raytheon Aircraft Co***. (1999), 67 B.C.L.R. (3d) 278 (C.A.), aff'd 2001 SCC 26, were summarized by Madam Justice Satanove in ***Global Light Telecommunications Inc. v. GST Telecommunications Inc.*** (1999), 33 C.P.C. (4th) 206 (B.C.S.C.) at para. 21.

> ...
>
> 3. A real and substantial connection test is applicable not only to determine *jurisdiction simpliciter* but also in evaluating the appropriateness of a particular forum;
>
> 4. When it comes to a determination of the appropriate forum the onus is on the defendants to show another forum that that is clearly more convenient or appropriate. ... (***Amchem,*** *supra)*;
>
> 5. The factors commonly considered in determining a real and substantial connection are the parties' residences and places of business, where the cause of action arose, where the damage was suffered, any juridical advantages and disadvantages, convenience and expense, governing law and the existence of any parallel proceedings. (***Amchem,*** *supra*);
>
> 6. The right of the plaintiff to sue in the court of his choice is not now a significant factor. It has been replaced by the governing principle of comity of nations. (***Thrifty, Westec***, *supra*);
>
> ...
>
> 8. In determining whether another forum is more appropriate the choice is to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. (***Westec***, *supra*); and
>
> 9. If the court is satisfied that both British Columbia and the foreign courts are appropriate for a and one is not clearly more appropriate than the other, then the court, to some degree, will necessarily favour the party who initiates the proceedings first. (***Westec***, *supra*).

[38] Mr. Coutts submits that the Court ought to decline jurisdiction in favour of the state of Georgia or, in the alternative, Minnesota, on the basis that B.C. is not the *forum conveniens*. He suggest that the following factors connect this litigation to Georgia:

> (a) Aspen Inc. carried on business at the relevant time in Georgia, as well as Minnesota;
>
> (b) the plaintiff resides in Georgia;
>
> (c) the employment contract was performed primarily in Georgia, in addition to neighbouring American States;
>
> (d) the plaintiff was paid in American dollars;

(e) the plaintiff received the same American benefits as other Aspen Inc. employees;

(f) the plaintiff paid social security, workers' compensation and unemployment insurance premiums to the American government;

(g) any damages occurred in Georgia; and

(h) the plaintiff's primary witnesses reside in Georgia.

[39] Mr. Coutts submits that, in a case of wrongful dismissal, the place where the employment is carried out and performed is the most important factor in determining the connection to a jurisdiction. The applicable law should be that of the jurisdiction where the plaintiff habitually carries out his work and resides - in this case, Georgia.

[40] Mr. Coutts cites ***Westec*** *supra*, for the proposition that, in the absence of evidence to the contrary, the principles of law ought to be assumed to be the same in Georgia, or Minnesota, as B.C. Thus, he says, the plaintiff will not benefit from any juridical advantage in B.C.

[41] In the alternative, it is suggested that the Court should decline jurisdiction in favour of Minnesota because that is where Aspen Inc. carries on business and there is a clear connection between a Minnesota Court and Aspen Inc.

[42] In my opinion, the following factors are indicative of a "real and substantial connection" between the plaintiff's action and B.C.:

- the corporate office of the Aspen Trailer Group was in B.C. at all material times;
- the plaintiff's transfer to the U.S. was discussed and arranged in B.C.;
- visa arrangements were made from B.C.;
- after his transfer to the U.S., the plaintiff was paid from B.C. for the first three months; and
- corporate directions and policies affecting the plaintiff emanated from B.C..

[43] There are other factors that favour B.C. as the *forum conveniens.* The Aspen Trailer Group has no presence in Georgia. There are no witnesses in Minnesota and no part of the employment contract was performed or terminated there.

[44] The fact that the employment contract may be governed by U.S. employment law is not a bar to adjudicating the litigation in B.C.: see ***Gauthier v. Dow Jones Markets Canada Inc.*** (1998), 41 C.C.E.L. (2d) 10 (Ont. Gen. Div.).

Conclusion:

[45] I conclude that the plaintiff was employed by the Aspen Trailer Group, which operates in three jurisdictions and arranges its corporate affairs to maximize its business efficacy. The plaintiff had extensive dealings with all three defendant companies that comprise the Aspen Group as a result of that corporate structure. Accordingly, the plaintiff is entitled to a declaration that at all material times, the defendants carried on business as a common enterprise and their liability to the plaintiff, if any, is joint and several. The application of Aspen Inc. that the Court decline jurisdiction is dismissed.

"M.J. Allan, J."
The Honourable Madam Justice M.J. Allan