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.

INTRODUCTION

[1] The Plaintiff has brought a motion to amend the Statement of Claim and to add a party as Plaintiff in this matter which arises out of a series of allegedly fraudulent transactions which occurred in South Korea.

[2] The Defendant Cho makes a cross application for a stay of proceedings against the current Plaintiffs for lack of jurisdiction in British Columbia and in the alternative requests this court to decline jurisdiction on the basis that the matter should be heard in Korea. In addition, the Defendant Cho requests a declaration that this Court has no territorial competence in relation to the claims of the Plaintiff proposed to be added, or that this Court should decline jurisdiction in relation to the claims of the proposed Plaintiff. The Defendant also opposes the amendments sought on a number of grounds, including Rule 19(24), and says that the application to add the Plaintiff is misconceived

and would unnecessarily complicate this action, and that it is not “just and convenient” to allow the proposed Plaintiff to be added.

FACTUAL BACKGROUND

[3] The Plaintiffs allege that in 2004, they entered into a series of investments with the Defendant, whom they believed was a successful businesswoman in the field of real estate. The Statement of Claim alleges that the Defendant owned certain apartments which she had received in return for her investment in the construction of apartment buildings. In return for substantial sums of money, she would sell apartments to the Plaintiffs at a discounted price.

[4] The amount the Plaintiffs allege they transferred to the Defendant for the purchase of apartments is the equivalent of approximately $1.3 Million CDN. However, the Plaintiffs say that when the sale of the apartments was about to close, the Defendant was nowhere to be found. The Plaintiffs allege the Defendant never owned any apartments, and took their money to Canada where her older daughter used the funds to purchase a Yaletown condominium worth approximately $1.5 Million CDN. The two daughters are named Defendants in this action but did not take part in this motion.

[5] The Plaintiffs commenced their action on January 21, 2005. The disappearance of the Defendant Cho necessitated obtaining an order for substitutional service upon her. Such order was obtained and Cho was served on May 17, 2005 through the office of her solicitor. She filed an appearance on June 30, 2005. All matters concerning Cho are dealt with through her solicitor’s office and her whereabouts remain unknown to the Plaintiffs.

[6] Since entering an appearance, Cho has taken a number of steps in this action. She has demanded documents, filed a Statement of Defence (July 14, 2005), delivered a List of Documents, provided copies of documents to the Plaintiffs’ solicitor, requested trial dates and then subsequently advised she would await the motion to amend pleadings before she would set trial dates.

[7] Notably, her Statement of Defense contains no allegation that this court does not have jurisdiction over her in respect of the Plaintiffs’ claim against her. The rest of Cho’s Statement of Defense is a simple denial of the claims against her with a plea of estoppel to the transfer of funds as being in contravention of the currency laws of Korea.

THE PROPOSED AMENDED STATEMENT OF CLAIM

[8] The proposed amendments to the Statement of Claim allege that a fraud perpetrated on the proposed Plaintiff is based on the same scheme used to defraud the current Plaintiffs during the same time period as alleged by the current Plaintiffs, with the funds taken from the proposed Plaintiff ending up in the Yaletown condominium. The amount Cho is alleged to have taken from the proposed Plaintiff is approximately $900,000 CDN.

[9] The remaining amendments further particularize the allegations of fraud and conspiracy, list some of the known aliases of the Defendant Cho and her daughters, plead and particularize the alleged criminal history of the Defendant Cho in Korea, plead the assets purchased with the funds taken from the Plaintiffs are impressed with a trust for the Plaintiffs, plead particulars in support of a claim for special damages, expand on remedies claimed, and seek additional relief. Were it not for the application to add a Plaintiff, these amendments would have been permitted under Rule 24(1) of the *Rules of Court*, B.C. Reg. 221/90. However, Rule 15(5) requires leave of the court to add a party.

[10] The Defendant Cho says that these proposed amendments are inflammatory, particularly in view of the fact that a jury notice has been served by the Plaintiff. She says the proposed amendments plead evidence and not material facts and that the details of the criminal record alleged against her are inappropriate when placed in a pleading and in any event are in one respect inconsistent with the affidavit evidence of the proposed Plaintiff.

[11] The Defendant Cho also says that the materials of the Plaintiff are flawed because the affidavit materials do not consistently identify the notaries public in Korea who swore them, the exhibits to the affidavits are not translated into English and therefore cannot be verified by any person who does not read Korean, and the writ must be

amended to correspond with the proposed amendment to the style of cause to indicate the grounds on which it can be served *ex juris*. Cho has additional specific objections to the proposed amendments to the Statement of Claim which I will deal with later in these reasons.

ISSUES

1. Should a stay be granted in the existing action on the basis there is no jurisdiction in this Court, or should this Court decline jurisdiction?

2. If no to issue 1, then should the proposed amendments to the Statement of Claim be permitted (excepting the addition of the new Plaintiff)?

3. If yes to issue 2, then should the addition of a new party be permitted?

4. If yes to issue 3, then should the proposed new Plaintiff's action be stayed against the Defendant on the basis of *forum non conveniens*?

I will deal with each of these issues and the sub-issues they raise, in turn.

1. Should a stay be granted to the Defendants in the existing action on the basis there is no jurisdiction in this Court or should this Court decline jurisdiction?

[12] The Defendant Cho asserts that there is no territorial competence in this Court to hear this action against her. Territorial competence is the statutory description of what was formerly known as "*jurisdiction simpliciter*," and is found in the newly proclaimed *Court Jurisdiction and Proceedings Transfer Act,* S.B.C. 2003, c. 28 (the *"CJPTA"*). It is defined as follows:

> "territorial competence" means the aspects of a court's jurisdiction that depend on a connection between
>
> (a) the territory or legal system of the state in which the court is established, and
>
> (b) a party to a proceeding in the court or the facts on which the proceeding is based.

[13] There are a number of grounds set out in section 3 of the *CJPTA* which result in a finding of territorial competence. The grounds which are relevant to this case are paragraphs 3(b) and 3(e):

> 3 A court has territorial competence in a proceeding that is brought against a person only if
>
> …
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction,
>
> …
>
> or,
>
> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[14] Here it is clear the Defendant has submitted to the court's jurisdiction. She has taken several important steps in the litigation as indicated above and has not availed herself of protection from attornment by bringing a motion challenging jurisdiction within 30 days of filing her appearance or alleging a want of jurisdiction in her pleading under Rule 14(6)(c). Had she taken such a step, she would have enjoyed the protection conferred by Rule 14(6.4) and had the right to, *inter alia*, defend the action on its merits pending a decision by the court on an application challenging jurisdiction or the issue raised by the pleading contesting jurisdiction. Such an application would have been brought under Rule 14(6) and would have constituted an application or pleading contesting *jurisdiction simpliciter.* There is no discretion to such a ruling: either court has jurisdiction or it does not.

[15] In the absence of these steps, the actions of the Defendant must be taken to amount to attornment to the

jurisdiction of this Court. She has filed an appearance, a Statement of Defence which defends on the merits, she has demanded a List of Documents from the Plaintiff, she has provided documents to the Plaintiff along with a supplementary List of Documents, and has indicated she intends to defend this action in this Court. Defending a claim on the merits constitutes attornment: see ***Coulson Aircrane v. Pacific Helicopter Tours Inc.,*** 2006 BCSC 961 at paras. 33-37 ("***Coulson Aircrane***"); ***Ngo v. Go*** (2006), 146 A.C.W.S. (3d) 457, 2006 BCSC 71 at paras. 41-54 and authorities discussed therein.

[16] In the case of ***O'Brien v. Simard***, 2006 BCSC 814 ("***O'Brien***"), Preston J. stated at para. 23:

> . . . the protection from attornment under Rule 14(6.4) is only activated by a notice of motion or pleadings challenging jurisdiction *simpliciter* under Rule 14(6), not a challenge on the grounds of *forum non conveniens* under Rule 14(6.1).

[17] The defendant in ***O'Brien*** was denied leave to appeal by the Court of Appeal at 2006 BCCA 410.

[18] The Defendant does not deny that she has not made application challenging *jurisdiction simpliciter* and has not pleaded want of jurisdiction as required by Rule 14(6) in a timely way. She asks that this Court extend the time to make such an application so that this current application could be considered to be a challenge to *jurisdiction simpliciter* made within the required time limit and thus attracting the protection of Rule 14(6.4) for subsequent steps she has taken. She has not provided any explanation for failing to apply or plead within the time limits except for her counsel's slip. However, errors of counsel would not seem to override the fact that the Defendant has taken substantive legal steps that constitute attornment to the jurisdiction of this Court. In this regard, see ***First National Bank of Houston v. Houston E & C, Inc.*** (1990), 47 B.C.L.R. (2d) 347, [1990] 5 W.W.R. 719 (C.A.) (holding that a litigant can attorn even without intending to, and even if he receives erroneous legal advice as to what constitutes attornment).

[19] While I am sympathetic to an inadvertent omission by counsel, I cannot accede to the proposition that the Defendant be permitted at this point to invoke the protection from attornment afforded by Rule 14(6.4) more than one year after she has taken important steps in the litigation, which steps have continued up to and including September of this year. The application to extend the time limits to permit an application under Rule 14(6.4) is denied.

[20] In any event, I would have found a "real and substantial connection" between British Columbia and the facts on which the proceedings against the Defendant are based. In this regard, I have considered section 10 of the *CJPTA* and hold that a real and substantial connection between British Columbia and the facts alleged and the Defendant may be found in at least sections 10(a), and (d) of the *CJPTA*. Those sections state as follows:

> Real and substantial connection
>
> 10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding
>
> (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,
>
> …
>
> (d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:
>
> (i) the trust assets include property in British Columbia that is immovable or movable property and the relief claimed is only as to that property;
>
> (ii) that trustee is ordinarily resident in British Columbia;
>
> (iii) the administration of the trust is principally carried on in British Columbia;
>
> (iv) by the express terms of a trust document, the trust is governed by the law of British Columbia,

Section 10(a) of the *CJPTA*

[21] The Plaintiffs assert an interest in property in British Columbia allegedly purchased with the proceeds of the Defendant's fraud against them. While there are some difficulties with the affidavit material provided, for purposes of jurisdictional facts, I am satisfied there is a factual basis to the allegations which ought to be tried. I am also cognisant of the difficulties in transmitting materials between two countries using different languages and different legal systems. I note as pointed out by the Defendant that most of the exhibits to the affidavits have not been translated into English. I can decipher the cheques and the numbers they show but as for the text alleged in the affidavits, I cannot read or determine if they support the corresponding assertion in the affidavit. There are, therefore, some averments I cannot accept. However, for the most part, I am able to determine the names and addresses of the various notaries before whom the affidavits were sworn and to understand that the facts alleged by the Plaintiffs would support a fraud undertaken by the Defendant which was witnessed by, among others, her assistant. The funds she allegedly generated were then transferred to Canada, converted by one of the other Defendants into usable funds with which her daughter purchased a condominium. It is the title to that condominium in which the Plaintiffs seek to assert an interest. These facts bring the Plaintiffs within section 10(a).

Section 10(d) of the C*JPTA*

[22] The Plaintiffs seek a finding that assets which the Defendant daughter Jioh purchased with funds which allegedly were obtained by fraud from the Plaintiffs are held in trust for the Plaintiffs. Such a plea would make Jioh the constructive trustee for the Plaintiffs and thus bring into play the provisions of section 10(d) and the facts alleged are sufficient to give an air of reality to this plea.

[23] Therefore, this court has *jurisdiction simpliciter* over this action under two grounds listed in section 3 of the *CJPTA*, that of submission to the court by the personal Defendant and the existence of a real and substantial connection on at least two of the categories set out in section 10.

[24] If this were not sufficient to decide this part of the Defendant's application then I would consider the doctrine of *forum conveniens* as a discretionary basis on which to decline jurisdiction. The considerations which the court must look to are set out in section 11 of the *CJPTA.* However, it is clear from ***O'Brien*** as followed by Ross, J. in ***Coulson Aircrane*** at paras. 40-46, that if the Defendant has attorned, a challenge to jurisdiction based on a *forum non conveniens* argument cannot succeed. I have already found attornment by the Defendant hence I need not deal with the discretionary basis on which to decline jurisdiction. It appears that a challenge based on *forum non conveniens* under Rule 14(6.1) can only be made where there has not been attornment.

[25] I note the comments of Low, J.A. in the application for leave to appeal the decision in ***O'Brien*** (2006 BCCA 410 at para. 9):

> There has been no case to date in this Court interpreting the purpose and scope of the new R. 14, but I am not persuaded that there is a meritorious argument that Preston J. erred in not applying R. 14(6.4) to R. 14(6.1). Rule 14(6.4) specifically mentions R. 14(6)… The subrule makes no mention of R.14(6.1) and it is clear that the intention of the drafters was to preserve the common law rule that the right to challenge jurisdiction on the basis of *forum non conveniens* expires with attornment. To use the language of R.14(6.4), once the defendant "submits to the jurisdiction of the court" he is precluded from asking the court to decline jurisdiction as opposed to contending that the court lacks jurisdiction as a matter of law.

[26] The Defendant Cho's application for a declaration that this Court lacks jurisdiction or, in the alternative, should decline jurisdiction is dismissed.

2. Should the proposed amendments to the Statement of Claim be permitted (with the exception of the addition of the new Plaintiff)?

[27] The law permits an unfettered discretion to the court to permit amendments as long as the discretion is

exercised judicially and in accordance with the evidence and the guidelines suggested by the authorities. (***Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*** (1996), 19 B.C.L.R. (3d) 282, 71 B.C.A.C. 161 ("***Teal Cedar***").)

[28] Rule 24(1) of the *Rules of Court* permits amendments to be made once without leave of the court where the notice of trial or hearing has not been delivered and at any time with the written consent of all the parties. As I have noted, without the addition of a Plaintiff, these amendments would have been permitted without the necessity of an application to the court. However, the Defendant has taken the opportunity to raise objections on a number of grounds to the form of pleadings proposed.

[29] The Defendant begins with a general objection which relates to the failure of the Plaintiffs to include an amended Writ of Summons indicating the grounds for service *ex juris*. This objection is answered by the application of the Plaintiffs to amend their application to include an order for substitutional service of the amended Statement of Claim on the Defendant Cho. I grant this application and require that the application to amend the Statement of Claim generally be subject to a properly endorsed amended Writ of Summons being included in the materials to be delivered to counsel for the Defendant Cho.

[30] I will begin by noting the paragraphs to which there is no objection raised.

[31] There is no specific objection to any of the amendments proposed with the exception of paragraphs 11, 11(a), 14(a), 15(a), (h), (i), (l), 21 and 30. I will deal with each in turn.

Paragraph 11

[32] The objection to paragraph 11 is that it is insufficiently particularized to allow the Defendant Cho to know the case she must meet. Paragraph 11 refers to an agreement by the Plaintiff Han *and others* which the Defendant states causes uncertainty to the Defendant Cho. I do not see this as a meritorious objection to the form of pleading since the Defendant Cho is entitled to demand particulars of this paragraph. This amendment is allowed.

Paragraph 11(a)

[33] As I read the Defendant Cho's objection to paragraph 11(a), this paragraph changes a material averment set out in the original Statement of Claim. Facts change as a case develops and additional information shows up. No doubt this change will provide some fertile ground for exploration in discovery of the Plaintiffs. This amendment is allowed.

Paragraph 14(a)

[34] In this paragraph, the Plaintiffs plead particulars of a misrepresentation allegedly made by the Defendant Cho that she was a wealthy and successful real estate investor. In fact, the Plaintiffs allege that her daughters knew that the Defendant Cho was a "convicted fraudster" and had numerous criminal convictions. This paragraph then sets out the alleged convictions of the Defendant Cho. The Defendant Cho says that amounts to a conclusion of mixed fact and law and a plea of bad character, which offend the rules of pleadings. The Defendant did not provide authority for this proposition. Rule 19(11) states:

> Where the party pleading relies on misrepresentation, fraud, breach of trust... full particulars, with dates and items if applicable, shall be stated in the pleading…

[35] The Plaintiffs respond that they are required to provide details of any misrepresentation alleged and so have provided the factual basis for alleging a misrepresentation made by the Defendant of her status. Certainly the Plaintiffs' alleged reliance on the Defendant's representation of her status is material to their loss and the factual basis for showing that her status was misrepresented is set out in this paragraph. I note that the *Commercial Court Guide*, quoted in Bullen, Leake & Jacobs*, Precedents of Pleadings*, 15th ed. (London: Sweet and Maxwell, 2004) at article I-35, states as follows:

> Full and specific details must be given of any allegation of fraud, dishonesty, malice or illegality. Where an inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged must be listed.

[36] This is a succinct statement of the practice of pleading fraudulent misrepresentation and is applicable to pleadings in our court.

[37] It is my view this is an acceptable pleading, but I have some misgivings about its potential for prejudice if put before a jury since I understand a jury notice has been served in this case. It will stand in the interim but I will permit the Defendant's application respecting paragraphs 14(a) and 15(a) to be renewed before the trial judge who hears this case.

Paragraphs 15 (h), (i) and (l)

[38] The Defendant complains that the plea contained in Paragraphs 15(h), (i) and (l) that the Defendant Cho "*bribed custom officials and/or airport police officers… to effect removal of the said funds contrary to Korean law…"* and the bribes allowed the removal of travellers' cheques from South Korea to British Columbia but when those travellers' cheques were tendered in British Columbia, were refused due to Canadian Banking Laws and "*inability and/or unwillingness to explain the source of such funds"* is a conclusion of mixed fact and law which is not permitted and is scandalous and intended to impugn the character of the Defendant Cho without any factual basis therefor.

[39] With respect to the first part of the Defendant's objection, that this plea contains a conclusion of mixed fact and law, I note that Rule 19(9.1) states that conclusions of law may be pleaded only if the material facts supporting them are pleaded. It is true that the details of Canadian Banking Laws are not set out but it is clear from the facts alleged in this paragraph that the averment relates to a Canadian requirement that the provenance of substantial sums of money being deposited in Canadian banks must be given to the financial institution in which the money is sought to be deposited. Certainly it could be made clearer but the pleading concerning the bribes and the attempt to tender the travellers' cheques is acceptable.

[40] The additional complaint that these allegations are scandalous must refer to Rule 19(24)(b), which allows a court at any stage of a proceeding to order any part of a pleading to be struck out or amended on the basis that:

> (b) it is unnecessary, scandalous, frivolous or vexatious…

[41] Where such an objection is made, the court must proceed on the assumption that the facts pleaded are true and the only question is whether they disclose a cause of action. It is not necessary to adduce evidence to support a pleading before trial. Here see *McNaughton v. Baker* (1988), 25 B.C.L.R. (2nd) 17, [1988] 4 W.W.R. 742 (C.A.).

[42] Proceeding on such a basis, that the facts in this paragraph are true, they would disclose a cause of action against the Defendant and as such would not meet the test in *McNaughton* to be struck out or amended. That they allege serious misconduct against the Defendant Cho imposes a high burden on the Plaintiffs to make their case against her or suffer the consequences in costs.

[43] Paragraphs 15(h), (i), and (l) will stand.

Paragraph 30

[44] The Defendant states that the Plaintiffs' claims of fraudulent preference and fraudulent conveyance cannot be maintained on the pleadings since there is no allegation of a perfected claim against the Defendant daughter Jioh Park, there is no evidence the property in BC has ever been transferred to a third party and there is no evidence the Defendants acted to prefer any creditor other than the Plaintiffs. While I understand the theory behind this pleading, that the Defendant Cho transferred funds to the Defendant daughter Jioh Park with the intention to hinder the ability of the Plaintiffs to obtain the return of their funds, there is no basis set out in the pleading to support the claims made under the *Fraudulent Conveyance Act,* R.S.B.C. 1996, c. 163 or the *Fraudulent Preference Act,* R.S.B.C. 1996, c. 164.

[45] This pleading must be amended to remove the references to the statutes on the basis there is no material fact pleaded to support such claims.

3. Should the addition of a new Plaintiff be permitted?

[46] Rule 15(5)(a)(iii) governs the addition or removal of parties in an action. It states as follows:

> (5) (a) At any stage of a proceeding, the court on application by any person may…
>
> (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
>
> (A) with any relief claimed in the proceeding, or
>
> (B) with the subject matter of the proceeding,
>
> which in the opinion of the court it would be just and convenient to determine as between the person and that party.

[47] Counsel for the Plaintiffs did not make detailed submissions with respect to the addition of the Plaintiff Yun. He stated simply that the test is whether it is "just and convenient" to add the Plaintiff Yun to the action. He points out that the scheme of fraud alleged against the Defendant is very similar to that which is alleged by the existing Plaintiffs, that the time period in which it is alleged to have taken place does not vary substantially from that alleged by the existing Plaintiffs, that the transfer of funds from South Korea to British Columbia was made just as it was made in the case of the existing Plaintiffs, and that the final resting place of the funds taken from the Plaintiff Yun is the Yaletown condominium and the other assets enjoyed by the Defendant daughters Jioh Park and Subi Park.

[48] The Plaintiff Yun seeks to participate in the same relief sought by the existing Plaintiffs against the Defendants.

[49] The Defendant opposes the addition of the Plaintiff Yun on several grounds, including a technical objection to the failure by the Plaintiff Yun to have the exhibits to his affidavit which support the alleged real estate transaction translated from Korean into English. The Defendant also says that the Plaintiff Yun has failed to demonstrate any connection between himself and the relief or subject matter of the proceeding and to explain the delay in joining the action.

[50] With respect to the lack of translation of the documents, I note that paragraph 6 of the Plaintiff Yun's affidavit at tab 6 of the Chambers Record refers mistakenly to exhibit "A" as copies of the cheques he issued. In fact these are exhibit "B" and the receipt he says he was given by the Defendant Cho is referred to in paragraph 7 and should be indicated as Exhibit "A". It is true that these documents have not been translated and certainly Exhibit "A" cannot be given any weight since the court has no idea what it says. However, with respect to the cheques, notwithstanding the fact that any writing on the face is in Korean, it is clear these are cheques and the dates and the amounts correspond with those stated in paragraph 6 of the Yun affidavit.

[51] While the affidavit is flawed in this regard, I do not see it as fatal to the application to join Yun to the action. Certainly the fact that he wishes to participate in the relief sought by the existing Plaintiffs is an important factor. As well, the evidence which will be sought from the Defendants will overlap with respect to the fraud alleged by Yun and by the existing Plaintiffs. There will be substantial commonality with respect to the scheme and methods allegedly used by the Defendants and with respect to several of the witnesses to the transfer of cheques to the Defendant Cho.

[52] The Defendant also raises the delay in joining Yun as a Plaintiff. He cites the case of ***Lawrence Construction Ltd. v. Fong*** (2001), 18 C.P.C. (5th) 377, 2001 BCSC 813 ("***Lawrence Construction***") for the proposition that prejudice is presumed in the absence of any explanation for the delay in advancing a new party's claims. However, that case is only authority for this proposition in the context of a delay which raised significant prejudice for the party to be added since under section 4(1) of the *Limitation Act,* R.S.B.C. 1996, c. 266, he would be unable to avail himself of a limitation defense open to the existing defendant. In ***Lawrence Construction***, D. Smith J. found it was "just and convenient" to add the additional Defendant since there was an agreement between

the Plaintiff and the proposed Defendant which would allow the proposed Defendant the same benefit of the *Limitation Act* defence open to the original Defendant. In the course of coming to that decision, D. Smith J. considered the effect of delay in the context of Rule 15(5)(a)(iii). With respect to this issue, at para. 31 she quoted Finch J.A. in ***Teal Cedar*** at paras. 64-67 as follows:

> There is no requirement in the authorities nor as a matter of "policy", that leave to add a new cause of action against existing parties should be refused solely on the basis that the plaintiff's conduct was the result of a deliberate decision or was "voluntarily dilatory".
>
> In the exercise of a judge's discretion, the length of delay, the reasons for delay and the expiry of the limitation period are all factors to be considered, but none of those factors should be considered in isolation. Regard must also be had for the presence or absence of prejudice, and the extent of the connection, if any, between the existing claims and the proposed new cause of action. Nor do I think that a plaintiff's explanation for delay must necessarily exculpate him from all "fault" or "culpability" before the court may exercise its discretion in his favour…

And at para. 32:

> The fundamental principle should be to balance the interests of justice and convenience in relation to all the parties. (Quoting Lambert J.A. in ***Lui v. West Granville Manor Ltd***. (1987), 11 B.C.L.R. (2d) 273 at 302.)

[53] I am, therefore, not persuaded that the delay of the Plaintiffs in joining Yun to the action should interfere with the exercise of my discretion to permit him to be joined as Plaintiff to this action and there is no "presumed prejudice" from that unexplained delay in the absence of a limitation issue or some other serious effect on the Defendant Cho.

[54] There are common issues to be determined between the parties. It is in the interests of justice and convenience to permit the Plaintiff Yun to be joined to this action and would involve a savings in time and costs to do so. I do not perceive that the Defendant would suffer prejudice as a result.

[55] The Plaintiff Yun will be joined and the service of the Amended Writ and Statement of Claim will be by substitutional service on counsel for the Defendant Cho.

4. Should the Plaintiff Yun's action be stayed against the Defendant Cho on the basis of the doctrine *forum non conveniens?*

[56] The Defendant contends that even if she has attorned to the jurisdiction of this Court to deal with the action brought by the existing plaintiffs, she has not so attorned to the Plaintiff Yun's action and she should be entitled to request this Court to decline jurisdiction in this portion of the action based on the doctrine of *forum non conveniens* if the Plaintiff Yun is joined.

[57] The matter of *forum non conveniens* is now to be determined in accordance with the provisions of the *JRPTA*: see ***Cresbury Screen Entertainment Ltd. v. Canadian Imperial Bank of Commerce*** (2006) 53 B.C.L.R. (4th) 40, 2006 BCCA 270 at para. 43; ***Coulson Aircrane*** at para. 47; ***Lloyd's Underwriters v. Cominco Ltd.***, 2006 BCSC 1276 at para. 98 ("***Lloyd's Underwriters***"). The principles from the earlier jurisprudence continue to provide a source of guidance, but s. 11 is neither dictated nor constrained by the existing case law: see ***Lloyd's Underwriters*** at paras. 99-104 (reviewing the legislative history and purpose of the *JRPTA*); ***Coulson Aircrane*** at para. 50. Sub-section 11(2) of the *JRPTA* sets out the factors a court must consider when deciding whether to exercise its territorial competence:

> 11 (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

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

[58] I note that this list of factors is inclusive, not exhaustive (see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Vancouver: Butterworths, 2002) at 51-52). However, considering only the factors enumerated in s. 11, the circumstances weigh strongly against this Court declining to exercise its territorial competence. As stated above with respect to R. 15(5)(a)(iii), there are common issues to be determined with respect to the Plaintiff Yun, and the relief sought by the Plaintiff Yun is essentially the same as that sought by the other Plaintiffs. Thus, factors (a), (b), (c), and (d) above favour British Columbia as the appropriate forum to hear the claims of the Plaintiff Yun. Additionally, because the relief sought is an interest in real property situated in British Columbia, the enforcement of an eventual judgment would be greatly facilitated by having this action proceed in this Court (factor (e) above). It is in the interests of justice that the action against the Plaintiff Yun proceed in this Court, and the Defendant has not shown that there is another forum which is a clearly more appropriate forum in which to determine the issues between the Defendant and the Plaintiff Yun.

[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 issues between the defendant and the third parties. However, in this case, the Defendant herself has attorned to the jurisdiction of this Court.

[61] I have come to the conclusion that to consider the Plaintiff Yun's addition to the action to permit a review of the application of the *forum non conveniens* doctrine to Yun's role in this case would be to treat the attornment of the Defendant to the jurisdiction of this Court in a piecemeal fashion. If the Defendant has submitted to the jurisdiction of this Court, she has accepted the authority of this Court to have the issues in the action heard and determined. Of necessity, that must mean that the parties are before the court under our *Rules of Court*. That must include the addition or removal of parties pursuant to Rule 15(5)(a)(iii).

CONCLUSION

1. The Defendant has attorned to the jurisdiction of this Court;
2. With attornment, there is no discretion to decline jurisdiction;
3. The amendments to the Statement of Claim are permitted as set out above, with the exception of paragraph 30 which pleads the provisions of the *Fraudulent Conveyance Act,* and the *Fraudulent Preference Act*;

4. The Plaintiff Yun is added as a party to the action;

5. Considering the doctrine of *forum non conveniens* in its traditional application and pursuant to the provisions of section 11(2) of the *CJPTA*, I do not exercise my discretion in favour of declining jurisdiction; and

6. The attornment of the Defendant is to the authority of the court under the *Rules of Court* and for the action as a whole. As such, once the addition of the Plaintiff Yun meets the test under Rule 15(5)(a)(iii), the Defendant is deemed to have attorned for the purpose of the addition of that party.

[62] The Defendant's applications are dismissed.

[63] Costs will be in the cause.

"L. Russell, J."
The Honourable Madam Justice L. Russell