IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hans v. Volvo Trucks North America Inc.,* 2010 BCSC 1700

Date: 20101201
Docket: S099074
Registry: Vancouver

Between:

Amandeep Hans and Pavandeep Hans

Plaintiffs

And

Volvo Trucks North America Inc., National Truck Centre Inc. dba Pacific Coast Heavy Truck Group, VFS Canada Inc. dba Volvo Financial Services and N. Yanke Transfer Ltd.

Defendants

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Counsel for the plaintiff:	R. Fleming
Counsel for the defendant N. Yanke Transfer Ltd:	V. Gauthier
Counsel for the defendants VFS Canada Inc. dba Volvo Financial Services, Volvo Trucks, North America Inc., and National Truck Centre Inc. dba Pacific Coast Heavy Truck Group	K. Rielly
Place and Date of Hearing:	Vancouver, B.C. October 25, 2010
Place and Date of Judgment:	Vancouver, B.C. December 1, 2010

[1] This is an application by the defendant N. Yanke Transfer Ltd. ("Yanke") pursuant to Rule 21-8(1)(b), formerly Rule 14(6)(b), for a stay or dismissal of this action in British Columbia on the basis of a forum selection clause favouring the law of Saskatchewan contained in their contract with the plaintiffs.

[2] The remaining defendants took no position on this application.

Background

[3] The factual background set out for the purposes of this motion is, of course, not binding in any subsequent proceedings.

[4] The plaintiffs, husband and wife, are long haul truck drivers.

[5] In 2007, they invested their life savings in a new Volvo truck, manufactured by the defendant Volvo Trucks North America Inc. ("Volvo Corp") which they purchased from the defendant Pacific Coast Heavy Truck Group ("the Dealer"), financing it through VFS Canada Inc. ("Volvo Finance").

[6] The plaintiff Amandeep Hans had entered into an exclusive owner-operator Linehaul Agreement with Yanke in 2008, and renewed it on January 9, 2009 (the "2009 Hauling Contract").

[7] The contract contains the following provisions which are relevant to the argument:

> 6. E. Insurance. The Company shall provide such insurance as is necessary to insure the Contractor against loss or damage to any said Equipment due to collision, fire, theft, or other causes, and against liability for bodily injury and property damage resulting from or arising out of the use, possession, or operation of said Equipment while under contract to the company.
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> 7. G. Irrevocable Agent for Settlement Purposes. That the Company, as irrevocable agent or attorney, may settle any claim with one or more third parties, arising from personal injury, death, or damage to property of others, made against the company, or Contractor, or both arising from or related to any act or failure to act of the Contractor or his employee)s) in the performance of this agreement, and the Company shall have the right to deduct amounts disbursed with respect of any such settlement which the

> Company negotiates on the behalf of the Contractor so long as the Company acts in good faith.
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> ....
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> 7. R. Governing Jurisdiction. This Agreement shall be construed and interpreted in accordance with the Laws of the Province of Saskatchewan and each of the Parties hereto hereby irrevocably attorn to the exclusive jurisdiction of the courts of Saskatchewan in respect of its interpretation or breach.

[8] The plaintiffs had many problems with the truck which they arranged to have repaired under warranty at various locations. Finally, on January 31, 2009, they were hauling a load from Montreal to Vancouver, and at 10:30 p.m. in a snow storm just inside the Manitoba border, all the electrical systems on the truck shut down, including the engine, lights, and for all practical purposes, the steering and brakes. Amandeep Hans, who was driving at the time, attempted as a last resort to stop the vehicle by applying the trailer brakes. The truck jackknifed and went into the ditch.

[9] The plaintiffs immediately reported the accident to Yanke. Yanke took the truck to Winnipeg for repairs. They interviewed the plaintiffs in Saskatoon and terminated Amandeep Hans' employment because of poor language skills. Pavendeep Hans could continue to drive, but she would not drive alone. Yanke de-registered the vehicle.

[10] Yanke retained an engineer to inspect the truck and determine the cause of the accident. Yanke received an engineering report on March 6, 2006, setting out the cause of the accident - a loose cab terminal nut.

[11] This report was not provided to the plaintiffs despite repeated requests. They did receive a letter from Yanke dated April 20, 2009, setting out the conclusion of the engineers and telling them the catastrophic failure was due to "the cab positive terminal nut somehow [becoming] loose." The letter informed the plaintiffs that the cause of the nut coming loose had not been determined and stated:

> Given that the essential vehicle operation can be catastrophically affected by a simple terminal failure, we are currently in discussions and working with Volvo Corporate to attempt a resolution.

[12] Yanke kept the truck until May 7, 2009, at which time they told the plaintiffs it was repaired and was ready to be picked up, and told them to arrange for the appropriate permits, since the vehicle was no longer "plated." The plaintiffs were reluctant to do so without understanding what had gone wrong with the truck and what repairs had been done. They were told the cost of repairs had been covered by Yanke, who was seeking compensation from Volvo Corp. for those costs and would put forward a claim for the plaintiffs' down time.

[13] The plaintiffs continued, through their lawyer, to request a copy of the engineering report and other documentation, including the policy of insurance which Yanke was contractually bound to obtain. They also queried the basis upon which Yanke was purporting to deal with Volvo for them as the plaintiffs took the position that any claim was theirs to make against Volvo, given that this was a one-vehicle accident.

[14] Without their truck, the plaintiffs were not earning income. They received notice from Vovlo in early April that the truck would be seized. Their lawyer requested extensions while he tried to obtain information about the dealings between Yanke and Volvo. Eventually, the truck was seized and sold in October 2009, with a shortfall which Volvo has demanded from the plaintiffs.

[15] The plaintiffs commenced this action on December 9, 2009, and discovery of documents is ongoing. The plaintiffs sue Volvo Corp. for the loss of the truck based on Volvo Corp.'s failure to identify and prevent the failure of the truck, for failure to warn, and for negligent design and manufacture. They seek rescission of the contract of sale and return of deposit, *inter alia,* from the dealer and Volvo Finance.

[16] They sue Yanke for breach of fiduciary duty, breach of its contractual duty of good faith, or alternatively breach of its agency duty, and wrongful dismissal. In general, their complaints against Yanke centre on Yanke's interference in the plaintiffs' relationship with Volvo, including Yanke's assumption that they alone would deal with Volvo in circumstances not covered by the irrevocable agent clause (7.G) in the contract, Yanke's failure to provide any information to the plaintiffs which

would allow them to assess realistically whether the truck was safe to drive, terminating the insurance on the truck without notice to the plaintiffs, and terminating Amandeep Hans' employment.

[17] The relevant paragraphs of the Statement of Claim are:

> 56. As set out above, Yanke was in a fiduciary relationship with the Plaintiffs and owed the Plaintiffs a corresponding fiduciary duty. The Plaintiffs say that Yanke breached its fiduciary duty, or alternatively its contractual duty of good faith, or alternatively its Agency Duty, to the Plaintiffs by
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> a. failing to make complete disclosure to the Plaintiffs of
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> i. the Engineering report and all information related to the cause of the catastrophic electrical failure and subsequent accident.
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> ii. all information about the scale of damage or nature of repairs; and
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> iii. all information about the content of Yanke's negotiations with Volvo Corp.
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> b. preferring its own interests over the Plaintiff's interests
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> c. failing to invite the Plaintiffs to the inspection of their truck so that they could protect their own interests
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> d. failing to preserve documents held in the truck related to the Plaintiff's claim; and
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> e. de-registering the truck and termination all insurance on the truck without advising the Plaintiffs
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> 57. As a result of these breaches of fiduciary duty by Yanke, the Plaintiffs suffered loss and damage.
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> 58. In particular, by failing to disclose the Engineering Report or any information related to the cause of the catastrophic electrical failure or the scale of the damage and nature of repairs to the truck, Yanke has rendered the truck a total loss to the Plaintiffs, and the Plaintiffs say that the total loss provisions in clause 6E of the 2009 Hauling Contract apply and that Yanke is obliged to pay the Plaintiffs fair market value for the truck.
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> 58. Furthermore, on or about February 18, 2009, Yanke terminated the Plaintiff Amandeep Hans' employment without cause or notice, and as such breached the 2009 Hauling Contract, causing the plaintiffs to suffer loss and damage.
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> 59. The Plaintiffs say that Yanke's termination of the plaintiff Amandeep Hans' employment in these circumstances was high-handed and in bad faith, and the plaintiffs seek aggravated and punitive damages.

The present motion

[18] Yanke relies on Rule 21-8(1)(b), formerly Rule 14(6)(b), to challenge the jurisdiction of this court. That Rule provides:

> (1) A party who has been served with an originating pleading or petition in a proceeding, whether that service was effected in or outside British Columbia, may, after filing a jurisdictional response in Form 108,
>
> (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

[19] Rule 24-1(14), which deals with transitional pleadings and ongoing steps, provides:

> If a step in a proceeding is taken before July 1, 2010, the former Supreme Court Rules apply to any right or obligation arising out of or relating to that step and to the extent that that right or obligation is to have effect before September 1, 2010.

[20] There is no issue that Yanke complied with the requirements of the former Rules of Court at the time they were in effect, and this motion was originally filed in April 2009 under the old rules. Under the old rules, jurisdiction could be challenged after filing an appearance. Yanke filed an appearance before filing this motion.

[21] Since the new rules have come into effect, a defendant challenging jurisdiction is required, pursuant to Rule 21-8(1), to file a jurisdictional response in Form 108 before any steps can be taken. Yanke did not file that document before filing the new form of motion which they were asked to file by the Registry. The plaintiffs say they have therefore attorned and the application must be dismissed on that technical ground. Yanke is ready to file the jurisdictional response, if required.

[22] The plaintiffs rely on *Borgstrom v. Korean Air Lines Co.* 2007 BCCA 263, in which the Court of Appeal considered an argument that mere compliance with Rule 14(6)(c) and Rule 14(6.4) was not enough to allow a challenge to jurisdiction where the challenge obviously lacked merit. The court held that procedural compliance was enough to bring the party within the rule. The plaintiffs say it necessary follows that failure to comply with the rules is fatal to the present application.

[23] This is not a situation in which the plaintiffs are taken by surprise by this challenge. They have been aware of the motion, which was properly brought under the old rules, since April, and it is only scheduling difficulties with both counsel that resulted in the motion being heard after the new rules took effect. The rules are our servants, not our masters, and cannot force the court to reach unfair conclusions because of the stipulation of an arbitrary date in the transitional provisions. This transitional rule cannot be taken to mean that the defendant loses the right to argue jurisdiction, a right they had under the rules when the motion was filed, because counsels' calendars interfered.

[24] Even if the strict application of the transitional provisions of the new rules would lead to the result sought by the plaintiffs, to dismiss their application on such a technical basis would be a triumph of form over substance and common sense and would circumvent the object of the rules as set out in Rule 1-3:

> The object of these Supreme Court Civil rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

[25] Moving on to the merits of the argument, Yanke frames its challenge as one to *jurisdiction simpliciter*, which they say requires a determination of whether or not the selection of forum clause in their contract with the plaintiff Amandeep Hans applies, and if it does, whether the plaintiffs can establish "strong cause" to override it. They do not seek a determination of *forum non conveniens*.

[26] Yanke relies on the principles respecting the construction of a contract contained in *Petty v. Telus Corp.* 2002 BCCA 135:

> The construction of a contract is a question of mixed fact and law. The question is what the parties intended by the language of the agreement, viewed objectively, in the circumstances in which the agreement was made.

[27] Yanke says both the plaintiffs and Yanke are involved in long haul trucking across North America in a commercial context. A reasonable man would construe the clearly worded jurisdictional clause to mean that Saskatchewan would have exclusive jurisdiction in respect of the 2009 hauling contract or an alleged breach thereof.

[28] Yanke says all of the claims as pleaded arise out of the contract or are linked to it. They rely on *Scalas Fashions Ltd. v. Yorkton Securities Inc.* (2003), 17 B.C.L.R. (4th) 6, 2003 BCCA 366, where a clause referring to "any disputes" was held to cover not only contractual claims, but those in tort and fiduciary duty. Yanke says that in the present contract, where the clause specifically refers to contractual disputes, it is even clearer that all claims related to the contract are covered.

[29] Yanke says the clause must be respected unless the plaintiffs, who bear the onus on this issue, establish a "strong cause" to override it. In that respect, the test is set out by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.* [2003] 1 S.C.R. 450, following, at para.19, the tests set out in *The "Eleftheria",* which I paraphrase here:

1. in what jurisdiction the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial
2. whether the law of the foreign court applies and if so whether it differs from the local law
3. with what jurisdiction either party is connected and how closely
4. whether the defendants genuinely desire trial in the foreign jurisdiction or are only seeking procedural advantages
5. whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would
    i. be deprived of security for that claim
    ii. be unable to enforce any judgment obtained
    iii. be faced with a limitation defence
    iv. be deprived of a fair trial.

[30] Yanke says the witnesses who can speak to a breach of the contract are in Saskatchewan. The parties should be bound by their bargain.

[31] The plaintiffs take a different approach. They rely on the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 ("*CJPTA*"). They point out that Yanke has sought a ruling only on *jurisdiction simpliciter*, not on *forum non conveniens. Jurisdiction simpliciter* is the same as "territorial competence." Therefore, according to the plaintiffs, the parties are bound by the definition of

"territorial competence" in the *CJPTA*, and s. 3(d) and (e) provide complete answers to the application:

> Section 3: A court has territorial competence in a proceeding that is brought against a person only if
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> ...
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> (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
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> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[32] Yanke is ordinarily resident in British Columbia because it is registered ex-provincially here and because it has appointed an agent in British Columbia as contemplated by s. 7(b)(ii) of the *CJPTA*. As well, s. 10 of the *CJPTA* sets out some factors from which a real and substantial connection is presumed to exist, including contractual obligations to be performed in British Columbia, a tort committed in British Columbia, and a business carried on in British Columbia, all of which, in the plaintiffs' submission, bring this action within the jurisdiction of British Columbia.

[33] The plaintiffs say that if the court moves on to a consideration of the appropriate forum, it must do so within the context of a consideration of *forum non conveniens,* and that must take place within s. 11 of the *CJPTA*, which Yanke has not invoked. Section 11 deals with a court declining jurisdiction on the basis that another forum is more convenient, and makes reference to many of the same considerations that were listed in the *Eleftheria*. Yanke would bear the burden of an application under this section, whereas under the common law, the plaintiffs bear the burden of establishing "strong cause" to override the forum selection clause.

[34] The factors listed in s. 11(2) as relevant to the determination of an appropriate forum are:

> (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,
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> (b) the law to be applied to issues in the proceeding,
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> (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.

[35] The plaintiffs provided their position on *forum non conveniens*, but the same considerations apply to the "strong cause" analysis, although the onus differs.

[36] They say the substance of their claim against Yanke is bound up with the claims against Volvo, and the court should consider the action as a whole, not defendant by defendant (*McNichol Estate v. Wolknik* (2001) 13 CPC (5th) 61 (Ont. C.A.)).

[37] The plaintiffs argue that, while their relationship with Yanke is contractual, every case involving a forum selection clause is going to involve a contract: the important question is how closely related the subject matter of the claim is to the contract. Here, the plaintiffs say the relationship is not close. The clause selects a forum only for disputes related to the interpretation or breach of the hauling contract. No reasonable man, looking at the facts underlying this claim, would have contemplated such a dispute arising under this contract. Pavendeep Hans is not even a party to the contract with Yanke, but she is a party to the contract with Volvo, has suffered the same losses as Amandeep Hans and is subject to the same demand for the shortfall as Amandeep Hans.

[38] The plaintiffs submit that Yanke is merely trying to delay and prevent the claim against it from being determined on the merits, and they cannot afford to pursue two claims in different provinces. As well, they say the wrong dismissal claim must be dealt with in British Columbia under the *Employment Standards Act*, R.S.B.C. 1996, c. 113.

Discussion

[39] The positions of the plaintiffs and Yanke are at odds, not only in substance, but in their respective approaches to the steps in the analysis. Yanke says the court must determine the applicability of the forum selection clause first, which they term

"*jurisdiction simpliciter*," and which includes a consideration of "strong cause" (if the plaintiffs choose to advance that argument), and is to be decided on common law principles. The plaintiff says s. 3 of the *CJPTA* governs and if any further analysis is to take place, the statutory factors in s. 11 are determinative, as the statute is a complete code (see *Teck Cominco Metals Ltd. v. Lloyd's Underwriters* [2009] 1 S.C.R. 321).

[40] *Teck Cominco*, which was a case based in negligence and an insurer's duty to defend, does not make reference to a forum selection clause. In that case, the State of Washington had asserted jurisdiction, and the issue was whether the British Columbia court must/should respect that decision.

[41] During argument on the present case, the court was referred to a number of authorities considering whether a particular forum selection clause was wide enough to encompass the relevant cause of action and therefore give rise to a competition between jurisdictions. In all of them, *jurisdiction simpliciter* in British Columbia was established, and the analysis, conducted under the common law, moved to whether the clause covered the cause of action, and if so, whether there was strong cause to override it.

[42] In *Schleith v. Holoday* (1997) 31 B.C.L.R. (3d) 81 (B.C.C.A.), *jurisdiction simpliciter* in British Columbia was established. The court considered the applicability of the forum selection clause in favour of Ontario and held that the clause was really an election clause and lacked the "force and clarity required to engage the rule in *The 'Eleftheria'*". In *Voce Enterprises Ltd. v. K-Swiss* 2006 BCSC 1256, *jurisdiction simpliciter* in British Columbia was acknowledged. The court considered the forum selection clause relating to New South Wales and adopted the approach of *Schleith*, saying the clause was not clear enough but in the alternative, there was "strong cause" for overriding it. In *Scalas Fashions Limited v. Yorkton Securities Inc.*, 2003 BCCA 366, *jurisidiction simpliciter* in British Columbia was established, but the clause designating Alberta as the forum of choice was held to

be wide enough to cover the causes of action, and there was no strong cause to override it. The action in British Columbia was stayed.

[43] The only case to which I was referred which dealt with a forum selection clause and the *CJPTA* was *Fujitsu Consulting (Canada) Inc. v. Themis Program Management & Consulting Limited,* 2007 BCSC 1376. In that case, *jurisdiction simpliciter* was acknowledged and argument proceeded both on the common law under *The "Eleftheria"* and on the *CJPTA*. Since there had been an action in Ontario which had settled, the issue was argued on the basis of *forum non conveniens* in respect of whether the British Columbia action should be allowed to proceed. The court analyzed both the common law tests and those contained in the *CJPTA* and decided the action should be allowed to proceed because the forum selection clause, which designated British Columbia as the forum of choice, was clear and there was no strong cause to override it. This case pre-dated the Supreme Court of Canada's decision in *Teck Cominco,* and its determination that the *CJPTA* was a complete code for determining *forum non conveniens.*

[44] The relationship between challenges to *jurisdiction simpliciter* and determinations of *forum non conveniens* was examined thoroughly in *Han v. Cho* 2006 BCSC 1623 and *O'Brien v. Simard* 2006 BCSC 814, but neither case involved a forum selection clause.

[45] The different approaches taken by the parties in this case may be a result of the applicant having equated the term "*jurisdiction simpliciter*" with whether the contractual forum selection clause applies to the causes of action in the Statement of Claim.

[46] Determination of the applicability of a forum selection clause is not the same thing as *jurisdiction simpliciter*, although the method provided under the rules to provide protection from attornment may be the same. *Jurisidiction simpliciter* or territorial competence may exist, but the parties may have bargained it away.

[47] If the contractual forum selection clause applies, that is, if the parties have bargained away territorial competence, it only makes sense that the plaintiff must bear the onus of establishing that the clause should be overridden. The defendant should not, having successfully established the application of the contract to the causes of action, then have to go on to defend the forum a second time under an application to determine *forum non conveniens*.

[48] Despite the enactment of the *CJPTA*, the existence of the forum selection clause is, as stated in *Z.I. Pompey*, sufficiently important to warrant a different test than that required in a consideration of *forum non conveniens.* The Supreme Court of Canada said at paras. 20 and 21:

> [Forum selection clauses] are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law [citations omitted]. The "strong cause" test remains relevant and effective...in the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause.
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> ...
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> There is a similarity between the factors which are to be taken into account when considering an application for a stay based on a forum selection clause and those factors which are weighed by a court considering whether to stay proceedings in "ordinary" cases applying the *forum non conveniens* doctrine [citations omitted]. ...In the latter inquiry, the burden is normally on the defendant to show why a stay should be granted, but the presence of a forum selection clause in the former is, in my view, sufficiently important to warrant a different test, one where the starting point is that parties should be held to their bargain, and where the plaintiff has the burden of showing why a stay should not be granted.
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> ...
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> In my view, a separate approach to applications for a stay of proceedings involving forum selection clauses in bills of lading ensures that these considerations are properly taken into account and that the parties' agreement is given effect in all but exception circumstances.

[49] In view of these statements, I do not accept the plaintiffs' contention that mere territorial competence as defined in the *CJPTA* is enough to end the inquiry and require the defendants to bring another application based on *forum non conveniens*. The Supreme Court of Canada has recognized the value of forum selection clauses

and the importance of holding parties to their bargains. The *CJPTA* does not purport to override contracts, although it does allow for consideration of them in s. 10(e)(ii) (a real and substantial connection to British Columbia is presumed if the proceeding concerns a contract with a forum selection clause in favour of British Columbia) and arguably in s. 11(2)(b) (a relevant circumstance in deciding which court is appropriate is "the law to be applied to issues in the proceeding").

[50] If an action has already been commenced in another jurisdiction, as is the situation in many of the cases to which I was referred, then of necessity the analysis becomes one of *forum non conveniens,* even if the cause of action is contractual and a forum selection clause is included in the contract.

[51] In the case before me, the plaintiffs have chosen to bring their action in British Columbia in the face of the forum selection clause. There is no other action in another jurisdiction. The applicant bases its motion on the forum selection clause, not on a lack of territorial competence as defined in the *CJPTA.* I am satisfied that the proper inquiry begins with a consideration of whether the selection forum clause applies to the causes of action against Yanke, and if so, whether the plaintiffs can show strong cause to override it.

[52] In my view, the causes of action against Yanke, when considered objectively in light of all the circumstances, (the approach for construction of a contract set out in *Petty*, *supra*), are not covered by the forum selection clause.

[53] It is true that the claims made against Yanke exist because the plaintiffs and Yanke happened to be in a contractual relationship with each other. However, the claims arose not because Yanke and the plaintiff had a difference of opinion over the interpretation of the contract or alleged the other to be in breach of it, but because the plaintiffs had an accident while driving for Yanke, and because Yanke purported to take over all dealings with Volvo on behalf of the plaintiffs and did not keep the plaintiffs informed. The claims are not related to interpretation or breach of the contract, except perhaps the claim relating to breach of agency in respect of Yanke's alleged unauthorized dealings with Volvo - that is, whether that clause covers a one-

vehicle accident with no third party claims. Even there, a reasonable man would not, as the plaintiffs point out, ever contemplate the circumstances that have given rise to these claims, and it would not make sense to interpret the clause in such a way that one of many claims in a single action with several defendants would trigger its operation. As well, where the basis of the claim is that Yanke is acting on its own in purporting to deal with a third party on the plaintiffs' behalf without any contractual authorization, it begs the question to allow them to rely on the contractual forum selection clause by assuming the contract applies before that very issue is determined.

[54] If I am wrong in my finding that the contractual forum clause does not apply and were to move on to a consideration of "strong cause" under the common law, the plaintiffs would be successful in persuading me not to enforce the clause. The facts of this case involve interactions between Yanke and Volvo Corp. which have resulted in alleged losses to the plaintiffs. The purchase of the truck took place in British Columbia. The plaintiffs live in British Columbia. Yanke is registered ex-provincially in British Columbia. The various entities of Volvo are based in British Columbia and are proper parties to this British Columbia action. They purport in their pleadings to blame Yanke for any losses. Pavendeep Hans is as much involved and subject to loss as is her husband Amandeep but she is not a party to the contract relied on by Yanke in support of their position that the action must be tried in Saskatchewan.

[55] The undisputed evidence before me is that the plaintiffs are in difficult financial straits because of the events underlying this action and cannot afford to pursue two actions - one against Volvo in British Columbia, and one against Yanke in Saskatchewan. Two actions could well result in conflicting findings of fact.

[56] The plaintiffs bear the burden of establishing strong cause to override the contractual provision, but it is relevant to consider that Yanke puts forward no compelling reason to require the plaintiffs to commence another action in Saskatchewan. The only reason advanced is that there are witnesses from Yanke

who are situated in Saskatchewan, but there is no other connection to that province. The accident took place in Manitoba and the truck was repaired there. On the material before me, there is no advantage or prejudice to any party by the use of Saskatchewan law over British Columbia law.

[57] In my view, the result would be the same if the onus were reversed and the application had been brought under s. 11 of the *CJPTA.*

[58] In the result, the application to stay or dismiss the British Columbia action is dismissed. The plaintiffs should have their costs of this application in any event of the cause, at Scale B.

"M.A. Humphries J."

The Honourable Madam Justice M.A. Humphries