Robert Fleming LAWYERS

1925 – 925 West Georgia
Vancouver V6C 3L2
Canada
t. +1 604 682 1659
f. +1 604 568 8548

The case of *Schwarzinger et al. v. Bramwell* et al. did not proceed to trial.

This case was resolved on terms that remain confidential, with a dismissal order being entered by consent of all of the parties.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Schwarzinger v. Bramwell,*
2011 BCSC 283

Date: 20110309
Docket: S100583
Registry: Vancouver

Between:

Karl Schwarzinger and TAG Properties SA

Plaintiffs

And

**Geoff Bramwell aka Geoffrey John Simon Bramwell,
John Bramwell aka Jonathon A. Bramwell, Kevin Fleming,
Nica Projects Ltd., formerly known as Nicaragua Developments Ltd., and
Lighthouse Enterprises Ltd., formerly known as Brammy Bros. Properties Ltd.**

Defendants

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Plaintiffs:	R. Fleming
Counsel for the Defendants Geoff Bramwell, John Bramwell, Nica Projects Ltd. and Lighthouse Enterprises Ltd.:	H. D. Edinger
No one appearing for the Defendant, Kevin Fleming.	
Place and Date of Hearing:	Vancouver, B.C. July 30, 2010
Place and Date of Judgment:	Vancouver, B.C. March 9, 2011

Introduction

[1] Four of the defendants, Geoff Bramwell, John Bramwell, Nica Projects Ltd. and Lighthouse Enterprises Ltd. ("Bramwell Defendants"), seek an order that this court either decline to exercise its jurisdiction to proceed with this case, or alternatively, stay proceedings until a Nicaraguan court determines the issue of whether the Bramwell Defendants had title at the material times to certain land in Nicaragua. The fifth defendant, Kevin Fleming, was not a party to this application. The Bramwell Defendants' application proceeded to a one-day hearing on the basis of the pleadings and affidavits.

[2] The plaintiffs' claims relate to their intended purchase of property in Nicaragua. The plaintiffs claim damages for breach of contract and deceit, declarations regarding funds, and other relief. The plaintiffs argued on this application that the Bramwell Defendants have attorned to this jurisdiction, and in any event, British Columbia is the appropriate forum for the action, and so the court should not decline to exercise its jurisdiction.

[3] The Bramwell Defendants argued that they have not attorned to this jurisdiction, and the appropriate forum for the action is Nicaragua because title to land is at issue.

[4] The applicable law includes the *Rules of Court* and the *Court Jurisdiction and Proceedings Transfer Act,* S.B.C. 2003, c. 28 ("*CJPTA"*).

Issues

[5] The issues are as follows:

1. Did the Bramwell Defendants submit to this court's jurisdiction by admitting facts in their statement of defence which would establish that this court has jurisdiction *simpliciter* or territorial competence, or by the form of their Notice of Motion dated April 20, 2010?

2. Did the Bramwell Defendants submit to this court's jurisdiction by filing a notice of motion to set aside the Worldwide Mareva Injunction, or by the applications heard June 18, 2010 and October 1, 2010?

3. If the Bramwell Defendants have submitted to the jurisdiction of this court, is the court precluded from considering an application for *forum non conveniens*?

4. If the Bramwell Defendants have not submitted to this court's jurisdiction, or, if they are not barred from bringing an application for *forum non conveniens* even if they have submitted, should the court decline to exercise its jurisdiction to hear this proceeding?

Background Facts

[6] On January 26, 2010, the plaintiffs filed the writ and statement of claim. They allege that the individual plaintiff, Mr. Schwarzinger, lives in Stow, Ohio, United States of America, and the corporate plaintiff is incorporated under the laws of Nicaragua. They allege that the individual defendants live or carry on business in B.C. and that the corporate defendants are incorporated under B.C. law.

[7] The plaintiffs claim damages for deceit, damages for breaches of contracts, a declaration that funds are held on trusts, equitable tracing, aggravated and punitive damages, interest, and costs.

[8] The plaintiffs allege that they agreed to purchase properties in Nicaragua from the Bramwell Defendants. The plaintiffs allege that the Bramwell Defendants made fraudulent misrepresentations to induce them both to purchase the properties, and to send certain funds. The plaintiffs allege that the corporate plaintiff and the defendant Geoff Bramwell entered into written contracts for the purchase and sale of two lots known as the Isla Mariana Lots. They allege that the plaintiffs and the Bramwell Defendants entered into an agreement for the purchase and sale of a Tamarindo Lot, and then entered into an agreement which was partly oral and partly

in writing to substitute the purchase of a lot in Suenos. The plaintiffs allege that they sent funds to the Bramwell Defendants on express trust terms, and the Bramwell Defendants breached those terms. The plaintiffs allege that the defendants entered into collateral oral contracts with the plaintiffs.

[9] The plaintiffs argued that they paid $260,405 US to the Bramwell Defendants in Vancouver, but have received nothing in return. Mr. Schwarzinger deposed that he wired funds to a bank account in Vancouver held by the defendant Nica Projects Ltd., formerly known as Nicaragua Developments Ltd. (“Nica”).

[10] The evidence included a copy of two written agreements regarding the Isla Mariana Lots. Both are described as being between the corporate plaintiff as purchaser and “(Geoff Bramwell) Nicaragua Developments” as vendor. There is an issue regarding whether the vendor is Geoff Bramwell or Nica. Article 6.2 of both Isla Mariana contracts provides that the Vendor will deliver “a transfer of the Nicaraguan equivalent of an Estate in Fee-Simple...”. Article 7.6 of both Isla Mariana contracts provides that “[t]his agreement shall be interpreted in accordance with the laws of British Columbia and the laws of Canada applicable therein.”

[11] The evidence also included a copy of a written agreement between the defendant Lighthouse Enterprises Ltd. as vendor and WOZ Properties of Nicaragua as purchaser regarding the Tamarindo Lot. Articles 6.2 and 7.6 are in the same terms as the Isla Mariana contracts. The Bramwell Defendants say there was an error in the name of the vendor and it should have been Toucan Properties Ltd. The plaintiffs say WOZ Properties of Nicaragua never came into existence and so the purchaser is Mr. Schwarzinger, the signatory as purchaser.

[12] None of the written agreements address what court should adjudicate disputes concerning the agreements.

[13] Also on January 26, 2010, the date this action was commenced, Mr. Justice Pitfield, when he was a member of this court, made an order, without prior notice to the defendants, restraining the defendants from dealing with any of their assets

worldwide ("Worldwide Mareva Injunction"). Under the heading "Exceptions to this Order", the Worldwide Mareva Injunction provided as follows:

> This order does not prohibit the defendants from spending a reasonable amount for their ordinary living expenses and spending a reasonable sum for legal advice and representation. Before spending any money the defendant must tell the plaintiff's solicitors where the money is to come from.

[14] At the time of the Worldwide Mareva Injunction, the Bramwell Defendants conducted business in British Columbia and elsewhere. The personal Bramwell Defendants are the owners of Brammy Bros. Painting and Restoration Ltd. ("Brammy Bros. Painting"), a B.C. commercial exterior painting company which had annual revenue in 2009 in the range of $800,000. As a result of the Worldwide Mareva Injunction, Brammy Bros. Painting was unable to pay creditors, employees and contractors.

[15] On February 8, 2010, the Bramwell Defendants filed an appearance.

[16] In a Notice of Motion dated February 9, 2010 and filed February 25, 2010, the Bramwell Defendants sought an order setting aside the Worldwide Mareva Injunction.

[17] On March 3, 2010, the Bramwell Defendants filed their statement of defence. They alleged pursuant to Rule 14(6)(c) that this court does not have jurisdiction over them in respect of the claims made in this proceeding. However, they admit that the individual Bramwell Defendants reside in B.C. and that the corporate Bramwell Defendants are companies incorporated in B.C. Those admissions are made after the following para. 2:

> In the alternative, if this Honourable Court does have jurisdiction over the Bramwell Defendants in respect of the claims made against them in this proceeding, which is expressly denied, the Bramwell Defendants say as follows.

[18] Section 7 of the *CJPTA* provides that companies which are extra provincially registered in B.C. are "ordinarily resident" in B.C. for the purpose of the part of the *CJPTA* regarding the territorial competence of B.C. courts.

[19] The statement of defence of the Bramwell Defendants seeks an order dismissing the plaintiffs' claims with costs. The Bramwell Defendants allege that at all material times, the corporate plaintiff has held the Nicaraguan equivalents of estates in fee-simple to the Isla Mariana Lots. The Bramwell Defendants deny the alleged misrepresentations and deceit. They allege that the party who agreed to purchase the Tamarindo Lot was a different party from either plaintiff. They allege that the agreement to substitute the Suenos property was conditional, and that the condition was not met. They deny that funds were paid to any of them on trust terms that have not been satisfied.

[20] On March 9, 2010, by consent, Mr. Justice Walker varied the Worldwide Mareva Injunction ("Consent Variation Order"). The Consent Variation Order substantially expands the section entitled "Exceptions to this Order." The Consent Variation Order provides that the individual Bramwell Defendants are not prohibited from each spending up to $4,000 per month for their ordinary living expenses as well as a reasonable sum for legal advice. It provides that the injunction does not apply to certain accounts, which were in the name of either Brammy Bros. Painting or one of the Bramwell Defendants. The Consent Variation Order also requires the Bramwell Defendants to report certain information to the plaintiffs.

[21] By notice of motion dated April 20, 2010, the Bramwell Defendants applied for an order that the court decline to exercise its territorial competence, on the basis that the court of another state is the more appropriate forum in which to hear the proceeding. The notice of motion does not allege that this court lacks territorial competence. This is the application at bar, which was heard on July 30, 2010.

[22] On June 18, 2010, before the hearing of this application, the plaintiffs obtained an order that the Bramwell Defendants produce a further list of documents.

[23] On October 1, 2010, following the hearing of this application, but while the decision was under reserve, the parties to this application consented to an order providing that the Bramwell Defendants failed to fully comply with certain provisions of the previous orders, and were put on notice that further significant non-

compliance would result in serious sanctions. The parties to this application agreed that the October 1, 2010 appearance would not constitute attornment.

Analysis

1. Did the Bramwell Defendants submit to the court's jurisdiction by admitting facts in their statement of defence which would establish that this court has jurisdiction *simpliciter* or territorial competence, or by the form of their Notice of Motion dated April 20, 2010?

[24] The plaintiffs argued that, because the Bramwell Defendants admit facts in their statement of defence which mean that they are ordinarily resident in British Columbia, they are not in reality disputing jurisdiction *simpliciter,* and thus they have attorned to the jurisdiction of this court. The plaintiffs rely on *O'Brien v. Simard,* 2006 BCSC 814, leave to appeal ref'd, 2006 BCCA 410.

[25] The Bramwell Defendants rely on Rule 14 and *Borgstrom v. Korean Air Lines Co.,* 2007 BCCA 263.

[26] Section 2(2) of the *CJPTA* states that "[t]he territorial competence of a court is to be determined solely by reference to this Part." Section 3 of the *CJPTA* identifies situations where the court presumptively has territorial competence. One situation is where a defendant is ordinarily resident in British Columbia at the commencement of a proceeding (s.3(d)).

[27] The *Rules of Court* use the term "jurisdiction", rather than "territorial competence" or "jurisdiction *simpliciter*". In practice, the terms "territorial competence" and "jurisdiction *simpliciter"* are often used interchangeably, even though there may be some differences in what they include. Section 11 of the *CJPTA* allows the court to decline to exercise its territorial jurisdiction when it concludes that another forum is more appropriate to hear the proceeding.

[28] The Bramwell Defendants initiated this application when the former *Rules of Court,* B.C. Reg. 221/90 were still in effect, although the application was heard after the new *Rules of Court,* B.C. Reg. 168/2009 were in effect.

[29] Counsel relied on the former *Rules of Court* in submissions, and I will refer to them as well. For the sake of completeness, I include the relevant new *Rules* in Appendix A. The relevant new *Rules* are not materially different from the old *Rules*.

[30] The former *Rules* included the following:

> Rule 14 - Appearance
>
> ...
>
> Disputed jurisdiction
>
> (6) A party who has been served with an originating process in a proceeding, whether served with the originating process in that proceeding in or outside of British Columbia, may, after entering an appearance,
>
> > (a) apply to strike out a pleading or to dismiss or stay the proceeding on the ground that the originating process or other pleading does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
> >
> > (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, or
> >
> > (c) allege in a pleading that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.
>
> Order declining jurisdiction may be sought
>
> (6.1) Whether or not a party referred to in subrule (6) makes an application or allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.
>
> ...
>
> Powers of court pending resolution
>
> (6.3) If an application is brought under subrule (6) (a) or (b) or (6.2) or an issue is raised by an allegation in a pleading referred to in subrule (6) (c), the court may, on the application of a party of record, before deciding the first-mentioned application or issue,
>
> > (a) stay the proceeding,
> >
> > (b) give directions for the conduct of the first-mentioned application,
> >
> > (c) give directions for the conduct of the proceeding, and
> >
> > (d) discharge any order previously made in the proceeding.

> Party does not submit to jurisdiction
>
> (6.4) If, within 30 days after entering an appearance in a proceeding, a party of record delivers a notice of motion under subrule (6) (a) or (b) or (6.2) to the other parties of record or files a pleading referred to in subrule (6) (c),
>
> (a) the party does not submit to the jurisdiction of the court in relation to the proceeding merely by filing or delivering any or all of the following:
>
> (i) the appearance;
>
> (ii) a pleading under subrule (6) (c);
>
> (iii) a notice of motion and supporting affidavits under subrule (6) (a) or (b), and
>
> (b) until the court has decided the application or the issue raised by the pleading, the party may, without submitting to the jurisdiction of the court,
>
> (i) apply for, enforce or obey an order of the court, and
>
> (ii) defend the action on its merits.

[31] The Bramwell Defendants complied with Rule 14(6)(c), because after they entered their appearance, they alleged in a pleading (their statement of defence) that the court does not have jurisdiction over them in respect of the claim made against them in the proceeding. They complied with Rule 14(6.4), because they filed their statement of defence less than thirty days after entering their appearance.

[32] Under the plain words of Rule 14(6.4), the Bramwell Defendants did not submit to the jurisdiction of this court by filing either their appearance or statement of defence. That subrule also protects applications under subrule 6(a) and (b), which relate to whether this court has jurisdiction. However, the Bramwell Defendants' notice of motion dated April 20, 2010 sought an order under a different subrule, 6.1, which relates to whether B.C. is *forum non conveniens*.

[33] In *O'Brien*, Low J.A., sitting alone in Chambers, heard the application for leave to appeal of a B.C. resident defendant. She had sought an order declining jurisdiction on the basis of *forum non conveniens*, and her application had been dismissed. She had alleged in her statement of defence that the court did not have jurisdiction, or alternatively ought to decline jurisdiction.

[34] Low J.A. dismissed the application for leave to appeal. At para. 6, Low J.A. described the issue before the Supreme Court chambers judge as whether the (then recent) amendment to Rule 14 permits a defendant to be heard on the issue of *forum non conveniens* in circumstances under which the defendant at common law would have been found to have attorned. Low J.A. said at para. 9 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. He concluded that the intended appeal was without merit.

[35] In *Borgstrom*, the statement of defence also alleged that the court did not have jurisdiction, or in the alternative, that the court should decline to exercise its jurisdiction. In *Borgstrom*, the defendant was a company which was extra provincially registered in B.C., and so the B.C. courts in fact had territorial competence. However, unlike *O'Brien* and the case at bar, the notice of motion in *Borgstrom* sought the combined relief, of both an order that the court did not have jurisdiction, and if it did, declining to exercise the jurisdiction. The Supreme Court judge in *Borgstrom* had held that the appellant had attorned to the jurisdiction of this court.

[36] The panel of the Court of Appeal in *Borgstrom* held that the Supreme Court should have considered *forum non conveniens*. At para. 19, Hall J.A. wrote that, on the face of Rule 14(6)(c), the appellant appeared to have done what was necessary procedurally to bring itself within the provisions of that Rule, and that there was nothing in the Rule to support the provision that it mattered whether the pleading was bound to fail. He wrote at para. 21 that what the appellant did and pleaded brought it within the provisions of Rule 14 in an acceptable fashion to preserve its ability to argue the issue of *forum non conveniens* because it had not attorned to the jurisdiction of the Court. He held that it was legal error for the chambers judge to fail to go further and to consider whether the *forum non conveniens* argument ought to succeed.

[37] Hall J.A. referred to *O'Brien* in para 20. He wrote that in that case, it appears that the issue taken before the Supreme Court judge pertained only to whether or not the Court ought to decline jurisdiction on the basis of *forum non conveniens*.

[38] The only distinction I can find between *O'Brien* and *Borgstrom* is the form of the notice of motion, which in *O'Brien* related to *forum non conveniens* only, and in *Borgstrom* related to both *forum non conveniens* and territorial competence. The similarities are that in both cases, the defendant pleaded in her or its statement of defence both that the court did not have jurisdiction and that B.C. was *forum non conveniens*, and in both cases, the defendant was in fact ordinarily resident in B.C. and the B.C. court therefore in fact had jurisdiction. In *O'Brien*, the defendant was precluded from arguing *forum non conveniens*, and in *Borgstrom* the defendant was not.

[39] The Bramwell Defendants, like the defendant in *Borgstrom*, wished to argue *forum non conveniens*. The Rule permitted the Bramwell Defendants to take certain steps without attorning to the jurisdiction of this court, so long as they included certain words in their pleading. The Bramwell Defendants included those words.

[40] Rule 14(6.4) gives protection to defendants who file certain pleadings. It does not go on to require that they apply for an order that the court does not have jurisdiction.

[41] It would be preferable if the Rule specifically set out the procedure a defendant should follow if this court has jurisdiction but the defendant wishes to argue only that the court should not exercise that jurisdiction. For example, Rule 14(6.4) could be amended to include parties delivering notices of motion under subrule (6.1).

[42] The Bramwell Defendants included the pleading that preserved them from attorning to this court. The Rule was designed to give a practical method for dealing with challenges to the existence of this court's jurisdiction or to the exercise of it.

[43] As in *Borgstrom*, the fact that the allegation by the Bramwell Defendants that this court does not have territorial competence was bound to fail does not mean that the Bramwell Defendants attorned to the jurisdiction of this court. In addition, the Bramwell Defendants pleaded the facts establishing territorial competence in the alternative.

[44] It should not matter what form of notice of motion the Bramwell Defendants used, particularly when Rule 14(6.4) refers to the form of pleadings, and not to the form of notices of motion. It is unfortunate that Rule 14(6.4) requires a defendant to make allegations which are bound to fail simply to fall within the protection from attornment. It would compound that misfortune to require a defendant to seek relief in its notice of motion which it knows is bound to fail.

[45] As a result, the Bramwell Defendants did not submit to this court's jurisdiction by pleading that they were resident in B.C., or by the form of their Notice of Motion dated April 20, 2010.

2. Did the Bramwell Defendants submit to the court's jurisdiction by filing a notice of motion to set aside the Worldwide Mareva Injunction, or by the applications heard June 18, 2010 and October 1, 2010?

[46] The Bramwell Defendants served their notice of motion seeking to set aside the Worldwide Mareva Injunction after their appearance, but before they filed their statement of defence. They contend this step was taken under duress, because the original terms of the Worldwide Mareva Injunction caused them severe problems in running their business.

[47] The Bramwell Defendants rely on *Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd.* (1996), 13 B.C.L.R. (3d) 41 (C.A.) at para. 15 for the proposition that an appearance before court made under duress does not constitute accepting the jurisdiction of this court over the proceeding:

> ... the law in British Columbia today entitles a party to an action to dispute an order for service *ex juris* upon him of an originating proceeding, and to challenge jurisdiction, both *simpliciter* and *forum conveniens*, without the risk that bringing such applications will constitute acceptance by him of the jurisdiction of the court. Beyond that, the common law prevails such that

> unless an appearance before the court is made under duress, it will be regarded as voluntary. [Emphasis added.]

[48] Mr. Justice Wood wrote at para. 8 that historically, duress "in this context was limited to those circumstances in which property belonging to the protesting party had been seized by process and was in the custody of the foreign court."

[49] The customary definition of duress is from *Pao On and others v. Lau Yiu and another,* [1979] 3 All E.R. 65 at 78 (P.C.), as follows: "Duress, whatever form it takes, is a coercion of the will so as to vitiate consent." That definition was adopted in this province in *Byle v. Byle* (1990), 65 D.L.R. (4th) 641 at 651 (B.C.C.A.). If the Bramwell Defendants were coerced into applying to set aside the Worldwide Mareva Injunction, it follows they were not appearing before the court voluntarily.

[50] The original *ex parte* Worldwide Mareva Injunction enjoined all the defendants from "selling, mortgaging, pledging, transferring, assigning, diminishing, or otherwise disposing of or dealing with any or all of their assets worldwide..." whether held directly or indirectly. While there was a clause permitting payment of ordinary living expenses, there was no clause permitting transactions in the usual course of business.

[51] The Worldwide Mareva Injunction, until the Consent Variation Order, prohibited the corporate Bramwell Defendants from carrying on in the ordinary course of business. It prohibited them from paying creditors, employees, and contractors.

[52] As a result, the Bramwell Defendants were under duress when they applied to vary the Worldwide Mareva Injunction. Although their assets were not in the custody of the court, the effect of the order was to prohibit them from dealing with assets. The Bramwell Defendants were forced to appear before the court in order to conduct their day-to-day business operations.

[53] As a result, the appearance of the Bramwell Defendants before the court with respect to varying the Worldwide Mareva Injunction was not voluntary. Their notice

of motion to set aside the Worldwide Mareva Injunction and their subsequent court appearance did not constitute attornment to this court.

[54] The Bramwell Defendants' court appearances for the June 18 and October 1, 2010 orders also do not constitute attornment. Rule 14(6.4) permits a party to defend the action on its merits until the court has decided the jurisdictional issue, without submitting to the jurisdiction of the court. The June 18, 2010 appearance related to production of a list of documents, and was part of defending the action on its merits.

[55] The parties agreed that the October 1, 2010 order would not be raised as further evidence of attornment of the Bramwell defendants.

[56] In summary, the Bramwell Defendants did not attorn to the jurisdiction of this court when they applied to vary the Worldwide Mareva Injunction or when they made the applications resulting in the June 18, 2010 and October 1, 2010 orders.

3. If the Bramwell Defendants have submitted to the jurisdiction of this court, is the court precluded from considering an application for *forum non conveniens*?

[57] Because the Bramwell Defendants have not submitted to the jurisdiction of this court, it is not necessary to address this issue.

[58] I note for completeness that in *Blazek v. Blazek,* 2010 BCCA 188 (Chambers), Neilson J.A. granted leave to appeal, among other things, the issue of whether attornment is a bar to arguing *forum non conveniens.*

4. If the Bramwell Defendants have not submitted to this court's jurisdiction, or, if they are not barred from bringing an application for *forum non conveniens* even if they have submitted, should the court decline to exercise its jurisdiction to hear this proceeding?

[59] The relevant sections of the *CJPTA* are as follows:

> Proceedings against a person
>
> 3 A court has territorial competence in a proceeding that is brought against a person only if

> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction,
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
>
> (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
>
> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.
>
> ...
>
> Discretion as to the exercise of territorial competence
>
> 11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (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.

[60] The Bramwell Defendants are ordinarily resident in B.C. and admitted that in their statement of defence. As a result, this court has territorial competence pursuant to s. 3(d) of the *CJPTA*.

[61] The question of the interpretation of s. 11 of the *CJPTA* was considered by three levels of court in *Lloyd's Underwriters v. Cominco Ltd.,* 2006 BCSC 1276, aff'd 2007 BCCA 249, aff'd (*sub nom. Teck Cominco Metals Ltd. v. Lloyd's Underwriters)*, 2009 SCC 11, [2009] 1 S.C.R. 321.

[62] At the level of this court, Mr. Justice Davies wrote that s. 11 should be informed by existing case law, but the legislation must be given a fair, large and liberal interpretation. He wrote as follows at para. 102:

> ...the provisions of s. 11 of the *CJPTA* should be considered to be part of a comprehensive remedial statutory scheme that is intended to codify the determination of jurisdictional issues in British Columbia. As such the provisions of s. 11 should be interpreted as being informed by but neither dictated nor constrained by the existing case law. Expression must be given to the statutory provisions by means of a fair, large and liberal construction and interpretation that best ensures that the objects of the legislation are attained.

[63] In his analysis of the s. 11 factors at para. 106, Davies J. considered factors arising in the common law prior to the coming into force of the *CJPTA.* In particular, he cites factors listed in *Stern v. Dove Audio Inc.,* [1994] B.C.J. No. 863 (S.C.), which refer to *Amchem Products Inc. v. British Columbia (Workers' Compensation Board),* [1993] 1 S.C.R. 897.

[64] The approach taken by Davies J. was approved by the Court of Appeal (at para. 55 of that decision) and the Supreme Court of Canada (at para. 37 of that decision). As a result, I will assess each factor listed in s. 11 as well as the other circumstances relevant to the proceeding.

(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

[65] There are factors under this heading which suggest both British Columbia and Nicaragua as the better forum.

[66] The factors which suggest that British Columbia is the appropriate forum are as follows:

a) The plaintiffs selected the forum of British Columbia, and presumably consider it the more convenient forum;

b) All the defendants reside in British Columbia, and so proceedings here would likely be convenient for them as witnesses and in instructing counsel; and

c) The Worldwide Mareva Injunction was ordered by the British Columbia court, and would be readily enforced by it.

[67] The following factors suggest Nicaragua is the appropriate forum:

a) The plaintiff corporation is a Nicaraguan corporation;

b) Several potential witnesses, such as agents, legal counsel, and title insurers are in Nicaragua;

c) Evidence about the value of property in Nicaragua may be required, which would likely require an expert from Nicaragua; and

d) If Nicaragua is found to be the appropriate forum, at least in theory, this court could stay these proceedings, but allow the Worldwide Mareva Injunction to remain in place at least until the plaintiffs had similar protection through the Nicaraguan court.

[68] The parties are likely to be the primary witnesses in this case. In addition to the alleged breaches of contract, there are significant issues concerning what if any representations were made, and whether they were fraudulent misrepresentations.

[69] On balance, this factor weighs in favour of British Columbia.

(b) the law to be applied to issues in the proceeding

[70] With regard to choice of law, Davies J. in *Lloyd's* at paras. 137-138 wrote as follows:

> While it will usually be the case on a *forum non conveniens* application that there are competing choices of law issues that cannot be finally resolved at the outset of the litigation, there are also some situations in which the question of the law that will likely be applied is so central to the issues in the litigation and to the determination of which forum is more appropriate to hear

> the dispute that a detailed "proper law" analysis is not only appropriate but necessary.
>
> Such a preliminary assessment will not, of course, be finally determinative since it will generally not be based upon a full evidentiary record. However, the preliminary assessment may weigh heavily in the balancing of the factors to be considered in determining the appropriate forum in which to litigate the issues between the parties.

[71] Both the plaintiffs and the Bramwell Defendants focused their argument on the contract and immoveable property issues as critical to the outcome of this application. I will also focus my analysis on those issues, although I will briefly address the tort issue as well.

i) Contract

[72] All three written contracts between the parties have an "Applicable Law" clause that states "[t]his agreement shall be interpreted in accordance with the laws of British Columbia and the laws of Canada applicable therein."

[73] The written contracts stipulate that the vendor was required to provide the equivalent of "Fee-Simple" title. As a result, evidence of both British Columbia and Nicaraguan property law may be required, to establish both what is available in Nicaragua, and how it relates to an Estate in Fee Simple in British Columbia.

[74] The plaintiffs argue that there was a fourth contract, of mixed oral and written terms, governing the exchange of the Tamarindo Lot for a Suenos lot.

[75] The proper law of the contract is that which the parties intended to apply, and the intention is objectively ascertained. See *Vita Foods Products Inc. v. Unus Shipping Co.,* [1939] 2 D.L.R. 1 at 8 (P.C.); *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. The Al Wahab,* [1983] 2 All E.R. 884 at 888.

[76] On the evidence presently available, it appears that the proper law of the two Isla Mariana contracts and the Tamarindo contract is that of British Columbia. The fourth contract, relating to the Suenos property, appears to be related to the first three, and therefore it is likely that the parties also intended that the proper law of the fourth contract was to be British Columbia.

ii) Immoveable Property

[77] The Bramwell Defendants argued that the real issue in the lawsuit is title to land, and that any determination of title to a foreign immoveable must be conducted where the property is located. The plaintiffs argued in response that they are seeking *in personam* remedies that this court is competent to provide.

[78] The plaintiffs seek damages and declarations regarding funds. They have not sought specific performance of the contracts of purchase and sale of property.

[79] A leading Supreme Court of Canada case on this issue is *Duke v. Andler,* [1932] S.C.R. 734. The court declined to recognize a judgment of a California court on a dispute between California residents regarding title and ownership of real property in B.C. Mr. Justice Smith affirmed at 738 the general rule that "courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country." However, he noted at 739 that there is jurisprudence in which "English courts will enforce rights affecting real estate in foreign countries if such rights are based on contract, fraud or trust, and the defendant resides in England".

[80] At 744, Smith J. wrote that the judgment of a foreign court, adjudicating on the right and title to real property in B.C., is *in personam* only, and affects the conscience of the parties within the jurisdiction of the court. This is the *in personam* exception, where the court has jurisdiction over the parties involved and can enforce an agreement. The *in personam* exception was also recognized in *British South Africa Co v. Companhia De Moçambique and others,* [1891-94] All E.R. Rep. 640 at 648.

[81] More recently, the Ontario Court of Appeal in *Catania v. Giannattasio* (1999), 174 D.L.R. (4th) 170, affirmed the *in personam* jurisdiction exception to the general rule that Canadian courts have no jurisdiction to determine title to foreign land. Laskin J.A., writing for the court, at para. 12, cites McLeod, *The Conflict of Laws*, (Calgary: Carswell, 1983) at 321 for the four prerequisites insisted on by the courts to ensure that only effective *in personam* jurisdiction is exercised pursuant to the exception:

> (1) The court must have *in personam* jurisdiction over the defendant. The plaintiff must accordingly be able to serve the defendant with originating process, or the defendant must submit to the jurisdiction of the court.
>
> (2) There must be some personal obligation running between the parties. The jurisdiction cannot be exercised against strangers to the obligation unless they have become personally affected by it ... An equity between the parties may arise in various contexts. In all cases, however, the relationship between the parties must be such that the defendant's conscience would be affected if he insisted on his strict legal rights ...
>
> (3) The jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment ...
>
> (4) Finally, the court will not exercise jurisdiction if the order would be of no effect in the situs ... The mere fact, however, that the *lex situs* would not recognize the personal obligation upon which jurisdiction is based will not be a bar to the granting of the order.

[82] In *Minera Aquiline Argentina SA v. IMA Exploration Inc.,* 2006 BCSC 1102 at para. 171, aff'd 2007 BCCA 319, leave to appeal ref'd, [2007] 3 S.C.R. x, the Court of Appeal at para. 93 affirmed the trial judge's order requiring British Columbia resident corporations to carry out a transfer of mining claims in Argentina, based in part on the fact that the court had *in personam* jurisdiction over the defendants, even though immoveable property in Argentina was at issue.

[83] In this case, the court has *in personam* jurisdiction over the Bramwell Defendants. The contracts give rise to personal obligations. The plaintiffs are seeking damages, as well as the remedies of equitable tracing, constructive trusts and an injunction. There is evidence that the Bramwell Defendants have assets in this jurisdiction. This court can supervise the execution in B.C. of any judgment made against the Bramwell Defendants because they reside here.

[84] The Bramwell Defendants are seeking that the action be dismissed. If the Bramwell Defendants succeed, that order can be enforced in this jurisdiction.

[85] I considered the argument of the Bramwell Defendants that to resolve any of the plaintiffs' claims requires a determination as to title to the lands in issue in Nicaragua. The Bramwell Defendants cited *Hesperides Hotels Ltd. and another v. Muftizade,* [1979] A.C. 508 as authority for the proposition that if, in order to

determine a tort occurred, a determination as to title in foreign land is required, the local court cannot take jurisdiction.

[86] The *Hesperides Hotels* case depended on the rule that the court has no jurisdiction to entertain an action for damages for trespass to foreign land. It did not relate to any tort other than trespass, and is not applicable here.

[87] The plaintiffs' claims fall into the *in personam* exception to the general rule that courts have no jurisdiction to determine title to land in a foreign jurisdiction. This court is not required to decline jurisdiction over this claim simply because it is related to property in Nicaragua. The question of the applicable law is simply one of the factors for the court to consider.

iii) Tort

[88] The plaintiffs allege that the defendants are liable to them for the tort of deceit. Counsel did not address the law applicable to this claim in submissions.

[89] Generally speaking, the law to be applied in tort cases is the law of the place where the activity occurred (the *lex loci delicti*): *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022.

[90] The affidavits filed on this application suggest that the alleged fraudulent misrepresentations occurred over the course of many months and many conversations over the phone and exchanges by e-mail. It is not clear exactly where the parties were at all relevant times. For example, many of Geoff Bramwell's emails to Mr. Schwarzinger include a Vancouver address and Vancouver phone numbers for Geoff Bramwell. Some of the other emails from Geoff Bramwell, John Bramwell and Mr. Fleming list Nicaraguan phone numbers. There is correspondence with the title insurance company First American which is located in Florida.

[91] It is not clear where the alleged torts occurred, and therefore is not clear what law will apply to the plaintiff's tort claims.

iv) Conclusion as to the law to be applied

[92] The three written contracts in evidence chose the law of British Columbia. Although the claim relates to real property in Nicaragua, this court is not required to decline jurisdiction, because the matter falls into the *in personam* exception to the rule that domestic courts cannot determine title to foreign land.

[93] On balance, the factor of the law to be applied suggests that British Columbia is the more appropriate forum.

(c) the desirability of avoiding multiplicity of legal proceedings and (d) the desirability of avoiding conflicting decisions in different courts

[94] Davies J. in *Lloyd's* wrote at para. 157 that these two factors:

> ... broadly encompass concerns relating to judicial comity as expressed in *Morguard* and *Amchem*. In *Stern* such factors were addressed by the need to consider: the existence of parallel proceedings; the legitimate juridical advantages or disadvantages to the parties in the competing jurisdictions; and the discouragement of forum shopping.

[95] Mr. Schwarzinger deposed that he gave instructions to begin a lawsuit in Nicaragua, but was given legal advice that suing the Bramwell Defendants in Nicaragua required a local guarantor of the entire amount of the claim, and that he had no way of finding such a guarantor. While this hearsay is not admissible to establish that it is impossible for the plaintiffs to proceed in Nicaragua, it suggests that Mr. Schwarzinger is not likely to pursue this claim in Nicaragua.

[96] There is no evidence that there are other proceedings in Nicaragua or that a conflicting decision is pending.

(e) the enforcement of an eventual judgment

[97] A judgment obtained in British Columbia could be enforced in British Columbia. The plaintiffs' claims are for damages, constructive trusts and equitable tracing. The defendants are resident in British Columbia, and their B.C. assets will be available to satisfy any resulting judgment in favour of the plaintiffs. The remedy

sought by the Bramwell Defendants, that the action be dismissed with costs, is a remedy that can also be enforced here.

[98] There was conflicting evidence about whether the Bramwell Defendants have assets in Nicaragua.

[99] The Bramwell Defendants suggested that a Nicaraguan judgment could be enforceable in British Columbia. Nicaragua is not a reciprocating jurisdiction under the *Court Order Enforcement Act,* R.S.B.C. 1996, c. 78. Therefore, if the plaintiffs obtained a judgment in Nicaragua and wanted to pursue the assets of the Bramwell Defendants in British Columbia, they would be required to bring an application for recognition and enforcement of any Nicaraguan court order under the common law.

[100] This factor, of the enforcement of an eventual judgment, suggests that British Columbia is the more appropriate forum.

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

[101] This factor is not relevant, because the other potential forum, Nicaragua, is not in Canada.

(g) other circumstances relevant to the proceeding

[102] Section 11 of the *CJPTA* does not set out a complete code, but rather some of the factors the court must consider. Section 11 begins as follows:

> 11(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence.

i) Plaintiffs' Choice of Forum

[103] The Court of Appeal in *Purple Echo Productions Inc. v. KCTS Television*, 2008 BCCA 85 at para. 59, held that in considering "the interests of the parties", the court should consider the fact that a plaintiff is *prima facie* entitled to its chosen forum. There, the court held that the chambers judge had erred by not considering the interest of the parties as mandated by section 11(1) and, in particular, the *prima facie* entitlement of Purple Echo to its chosen forum.

[104] The court then cited the Supreme Court of Canada decision, *Amchem Products Inc. v. British Columbia Worker's Compensation Board*, [1993] 1 S.C.R. 897 at 921:

> I agree with the English authorities that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff. [Emphasis in original.]

[105] It is an important factor in this case that plaintiffs chose to commence this proceeding in British Columbia.

ii) Nicaraguan Legal System

[106] The plaintiffs argued that there is "rampant corruption" in the Nicaraguan judicial system, including a lack of independence in the judicial system and bribery. They submitted an affidavit sworn by Omar Garcia-Bolivar, an international lawyer licensed to practice in Venezuela, New York, the District of Columbia and the United States Court of International Trade. Mr. Garcia-Bolivar asserts that he has experience in assessing legal systems in developing countries. He testified as an expert on the Nicaraguan judicial system in the American case *Sanchez Osorio v. Dole Food Co.,* 655 F. Supp. 2d 1307 (S.D. Fla. 2009).

[107] Mr. Garcia-Bolivar's affidavit includes a statement of his testimony and opinion in *Osorio.* His ultimate opinion is that the Nicaraguan judicial system lacks independence, is not impartial, is susceptible to bribery, involves political interference, and ranks at the lowest level among the world's judiciaries.

[108] In *Osorio*, the Florida court refused in 2009 to recognize a $97 million Nicaraguan judgment. The Nicaraguan court had ordered Dole Foods and Dow Chemicals to pay the plaintiffs that sum for exposing them to pesticides linked to sterility. The Florida court found that, based on evidence from the United States State Department and other agencies and experts, Nicaragua's judicial system did not provide impartial tribunals (at 1351). The court found that the plaintiffs had not rebutted the substantial evidence that Nicaragua did not have an impartial judiciary.

[109] In contrast, in an earlier American case, *Delgado v. Shell Oil Co.,* 890 F. Supp. 1324 (S.D. Tex. 1995), the Texas court found in 1995 that a number of countries, including Nicaragua, provided adequate remedies for plaintiffs in various actions against Shell Oil Co. regarding exposure to chemicals. The United States was deemed to be *forum non conveniens* for those actions.

[110] It is not necessary for me to come to a conclusion about the functioning of the Nicaraguan judiciary. However, the plaintiffs have raised a serious concern about whether the case would be decided on the merits in the Nicaraguan judicial system, which is a factor suggesting British Columbia is the appropriate forum.

Conclusion

[111] The most important factors can be summarized as follows. The plaintiffs chose to proceed in this court. The comparative convenience and expense factor favours British Columbia. The factor of the law to be applied favours British Columbia. The plaintiffs' claims fall into the *in personam* exception to the rule that courts cannot determine title to land in a foreign jurisdiction. The defendants have assets in British Columbia, so an eventual judgment for the plaintiffs can be enforced in British Columbia, and dismissal of the action can also be enforced here. Finally, the plaintiffs have raised a serious concern regarding whether the Nicaraguan judicial system would decide the case on the merits.

[112] The Bramwell Defendants have failed to demonstrate that Nicaragua is a more appropriate forum to hear this action. As a result, this court will retain its jurisdiction over this matter.

Summary

[113] The Bramwell Defendants' application is dismissed with costs.

_____

Gray J.

APPENDIX A

Rules of Court, B.C. Reg. 168/2009, R. 21-8.

Rule 21-8 — Jurisdictional Disputes

Disputed jurisdiction

(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,

> (a) apply to strike out the notice of civil claim, counterclaim, third party notice or petition or to dismiss or stay the proceeding on the ground that the notice of civil claim, counterclaim, third party notice or petition does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
>
> (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, or
>
> (c) allege in a pleading or in a response to petition that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

Order declining jurisdiction may be sought

(2) Whether or not a party referred to in subrule (1) applies or makes an allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.

...

Powers of court pending resolution

(4) If an application is brought under subrule (1) (a) or (b) or (3) or an issue is raised by an allegation in a pleading or a response to petition referred to in subrule (1) (c), the court may, on the application of a party of record, before deciding the first-mentioned application or issue,

> (a) stay the proceeding,
>
> (b) give directions for the conduct of the first-mentioned application,
>
> (c) give directions for the conduct of the proceeding, and
>
> (d) discharge any order previously made in the proceeding.

Party does not submit to jurisdiction

(5) If, within 30 days after filing a jurisdictional response in a proceeding, the filing party serves a notice of application under subrule (1) (a) or (b) or (3) on the parties of record or files a pleading or a response to petition referred to in subrule (1) (c),

(a) the party does not submit to the jurisdiction of the court in relation to the proceeding merely by filing or serving any or all of the following:

(i) the jurisdictional response;

(ii) a pleading or a response to petition under subrule (1) (c);

(iii) a notice of application and supporting affidavits under subrule (1) (a) or (b), and

(b) until the court has decided the application or the issue raised by the pleading, petition or response to petition, the party may, without submitting to the jurisdiction of the court,

(i) apply for, enforce or obey an order of the court, and

(ii) defend the proceeding on its merits.