Citation: Bains et al v Loader et al, 2023 MBCA 102
Date: 20231128

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron
Mr. Justice James G. Edmond

Docket: AI22-30-09870	)	
B E T W E E N:	)	
	)	***J. M. Woolley*** *and*
DALBIR BAINS and 10031670 MANITOBA LTD.	)	***J. R. Sundmark*** *for the Appellants*
	)	
(Plaintiffs) Respondents	)	***P. Halamandaris*** *and*
	)	***L. L. Gergely***
- and -	)	*for the Respondents D. Bains, 10031670 Manitoba Ltd. and N. Kaur-Bains*
RORY LOADER and SORTEPAX HOLDINGS LIMITED	)	
	)	
(Defendants) Appellants	)	***No appearance***
	)	*for the Respondents J. Tworek and Candela Capital Inc.*
- and -	)	
JAMES TWOREK and CANDELA CAPITAL INC.	)	***No appearance***
	)	*for J. Schumann, Josh Schumann Family Corporation Inc., A. Shapiro, The Shapiro Law Firm LLC, V. Jordan, K. Jordan, A. Bindra and Re/Max Executives Realty*
(Defendants) Respondents	)	
	)	
- and -	)	
JOSH SCHUMANN, JOSH SCHUMANN FAMILY CORPORATION INC., AARON SHAPIRO and THE SHAPIRO LAW FIRM, LLC	)	
	)	
	)	*Appeals heard and Decision pronounced:*
(Defendants)	)	***November 28, 2023***
	)	
- and -	)	
	)	

Docket: AI23-30-09884)
B E T W E E N :)
)
VICKY JORDAN and KEITH JORDAN)
)
(*Plaintiffs)*)
)
- and -)
)
DALBIR BAINS and NAVNEET KAUR-BAINS)
)
(Defendants) Respondents)
)
- and -)
)
RORY LOADER and SORTEPAX HOLDINGS LIMITED)
)
(Third Parties) Appellants)
)
- and -)
)
JAMES TWOREK and CANDELA CAPITAL INC.)
)
(Third Parties) Respondents)
)
- and -)
)
AMIT BINDRA, RE/MAX EXECUTIVES REALTY, JOSH SCHUMANN, JOSH SCHUMANN FAMILY CORPORATION INC., AARON SHAPIRO and THE SHAPIRO LAW FIRM, LLC)
)
(Third Parties))

BEARD JA (for the Court):

[1] The defendants/third parties, Rory Loader and Sortepax Holdings Limited (together, the Loader defendants), are appealing the dismissal of their motions to stay the claims against them under section 38 of *The Court of King's Bench Act*, CCSM c C280 and r 21.01(3)(a) of the Manitoba, *Court of King's Bench Rules*, Man Reg 553/88, on the basis that the Court has no jurisdiction over the subject matter of the actions.

[2] Immediately following argument at the motion hearing, the motion judge gave oral reasons, stating that he was declining to deal with the issues of arbitration and jurisdiction because he was of the view that they should be dealt with "in the broader context of the trial".

[3] At the appeal hearing, we granted the appeals and ordered that the motions be returned to the trial court for new hearings before a different judge, with brief reasons to follow. These are those reasons.

[4] In Linda S Abrams & Kevin P McGuinness, *Canadian Civil Procedure Law*, 2nd ed (Markham: LexisNexis, 2010), jurisdiction is explained as follows (at sections 2.13-2.14):

> In the context of the law of civil procedure, jurisdiction is the power or authority of a court to take cognizance of a matter put before it, to decide that matter and to enforce its decision. The jurisdiction that a court possesses is a matter of law. . . .
>
> A court may not act where it lacks jurisdiction, and any decision, order or judgment given by a court that lacks jurisdiction may be declared a nullity, and may be restrained by judicial review in the case of an inferior court. . . .
>
> [footnotes omitted]

[5] When jurisdiction is challenged, that issue must be determined before the court has any authority to take any further steps in the matter. (See CED 4th, *Conflict of Laws*, "Jurisdiction of the Courts" at §§4-6 (September 2023).)

[6] Briefly, there are two separate aspects to jurisdiction: jurisdiction *simpliciter* and *forum non conveniens*. Jurisdiction *simpliciter* asks whether a court has jurisdiction to determine the issue. *Forum non conveniens* determines whether the courts should decline to exercise that jurisdiction in favour of a clearly more appropriate forum. (See *Haaretz.com v Goldhar*, 2018 SCC 28 at paras 26-28 [*Haaretz*].)

[7] While the Loader defendants raised *forum non conveniens* in their motions for a stay in the Court of King's Bench and argued it at that hearing, they agreed at the appeal hearing that it was not a ground of appeal. Thus, these appeals can be determined on the basis of the motion judge's decision regarding jurisdiction *simpliciter*.

[8] As noted above, the motion judge addressed the jurisdiction argument by specifically declining to make any decision on jurisdiction, stating that he was declining "to deal with the issue of arbitration and jurisdiction" and that he felt "that it should be dealt with in the broader context of the trial and will be dealt with at the trial of this matter."

[9] The plaintiffs/defendants, Dalbir Bains and 10031670 Manitoba Ltd. (together, the Bains plaintiffs), were represented by new counsel at the appeal hearing. At that hearing, they conceded that it was an error of law for the motion judge to have ordered a trial before determining whether the court had jurisdiction over the subject matter of the actions. Without first finding

that he had jurisdiction, the motion judge had no authority to order or hold a trial. We agree that it was an error of law for the motion judge to order a trial before he determined the issue of the court's jurisdiction.

[10] At the appeal hearing, the parties argued that the appropriate remedy would be for this Court to set aside the orders and make its own decision on the motions for a stay of proceedings, pursuant to section 26(1) of *The Court of Appeal Act*, CCSM c C240.

[11] While we agree that we have jurisdiction to either order a new hearing or make the order that the motion judge should have made, the facts of this case indicate that there should be a new hearing.

[12] A new hearing is usually ordered where there are no reasons from the court below, findings of fact must be made and/or the determination of the appropriate order requires the making of discretionary decisions. (See *Canadian Broadcasting Corp v Manitoba*, 2021 SCC 33 at paras 7-8, 87-89 [*CBC*].)

[13] Determining jurisdiction *simpliciter* is a two-step process. First, the court must determine whether the existence of a recognized presumptive connecting factor has been established. If so, the court must consider whether the party challenging the assumption of jurisdiction (here, the Loader defendants) have successfully rebutted the presumption by establishing that there is no real and substantial connection between the chosen forum and the subject matter of the litigation. (See *Haaretz* at para 34).

[14] *Presumptive Connecting Factors*: Of the four presumptive connecting factors set out in *Haaretz* (see para 36), the Bains plaintiffs are

relying on the presumptive factor that a court has jurisdiction where the alleged torts were committed in Manitoba. Determining whether this presumptive factor has been established involves questions of fact and mixed fact and law.

[15] *Rebutting the Presumption*: If a court finds that one or more presumptive connecting factors have been established, it has to determine whether that presumption has been rebutted. As explained in *Haaretz*, "presumptive connecting factors must not give rise to an irrebuttable presumption of jurisdiction" and a "defendant may argue that a given connection is inappropriate in the circumstances of a particular case" (at para 42). This was explained by LeBel J, for the Supreme Court, in *Club Resorts Ltd v Van Breda*, 2012 SCC 17 (at para 95):

> . . . [The defendant] must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

See also para 81.

[16] Finally, *Haaretz* also states (at para 44):

> . . . While it is not appropriate to propose an exhaustive list of factors that can rebut the presumption of jurisdiction in these types of cases, it is not difficult to imagine circumstances in which it would not be reasonable to expect that the defendant would be called to answer a legal proceeding in a chosen forum. . . .

[17] The factual and discretionary nature of the test is confirmed in Abrams (at sections 9.85-9.86):

> The exact limits of what constitutes a reasonable assumption of jurisdiction cannot be defined. The principles followed in earlier cases should not be rigidly applied, since no court can anticipate all of the unique features that may be associated with all future cases. The real and substantial connection test is not meant to be a rigid test. . . . The assumption of, and the discretion not to exercise, jurisdiction must ultimately be guided by the requirements of order and fairness, as opposed to a mechanical counting of contacts or connections. . . .
>
> . . . The real and substantial connection test involves a fact-specific inquiry, which rests upon legal principles of general application. . . .
>
> [footnotes omitted]

[18] All this to indicate that the determination of whether a court has jurisdiction *simpliciter* to continue a proceeding requires it to make factual findings, to weigh evidence and competing factors and/or to make a discretionary decision as to whether jurisdiction has been established. None of this has been done in this case.

[19] These are decisions that are best made by the motion judge, as the fact-finder. As stated by the majority in *CBC* (at para 88):

> . . . [I]t is not in the interests of justice for this Court to step into the [motion judge's] shoes and decide these matters at first instance. This is quite different from considering such issues on appeal through the deferential lens this Court would take in reviewing the exercise of discretion below (see *R. v Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117). Other appellate courts have been rightly cautious to dictate to lower courts in this way (see, e.g., *GEA Refrigeration* [*GEA Refrigeration Canada Inc v Chang*, 2020 BCCA 361], at para. 184).

[20] As the motion judge failed to make the required findings of fact, to discuss or review the principles related to the tests that he was bound to apply, or to weigh the factors relevant to the issue of jurisdiction *simpliciter* in this case, this Court is not able to carry out its role of considering the issues on appeal through the deferential lens of reviewing the exercise of discretion by the motion judge. For these reasons, the appeals were granted and the motions are to be returned to the trial court for a new hearing before a different judge.

[21] The parties both agreed that the costs of the appeals should be in the cause. We agree.

Beard JA

Cameron JA

Edmond JA